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SUPREME COURT OF THE UNITED STATES.

No. 146 OCTOBER TERM, 1909.

CHARLES D. CAMPBELL,
Appellant.

vs.

FREDERICK WEYERHAEUSER AND JOHN A. HUMBIRD,
Appellees.

BRIEF FOR APPELLEES.

FRANK B. KELLOGG,
STILES W. BURR,
Of Counsel for Appellees.

SUPREME COURT OF THE UNITED STATES.

No. 176. October Term, 1909.

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BRIEF FOR APPELLEES.

PRELIMINARY STATEMENT.

The appellant here, who was appellant in the Court of Appeals also, was complainant in the Circuit Court. The appellees here were defendants in the Circuit Court and appellees in the Court of Appeals. As it will be necessary for us to refer frequently to another case in which the position of the parties is reversed in this court, we think it may prevent confusion if throughout this brief we refer to the appellant as complainant and to the appellees as defendants.

The case is a suit in equity to subject the patent title to the land in controversy to the alleged superior equitable claim of the complainant. The Circuit Court entered a decree dismissing the bill,

which was affirmed by the Court of Appeals; and complainant has appealed to this court.

The defendants hold under patent of the United States, issued to the Northern Pacific Railway Company upon a selection of the land in controversy under the indemnity provisions of the Northern Pacific grants; the land having been conveyed by the Railway Company to defendants by warranty deed, prior to the commencement of this suit. The sole basis of complainant's claim is that on October 26, 1895, long subsequent to the selection of the land by the Railway Company, although prior to the approval of such selection by the Secretary of the Interior, complainant proffered to the Register and Receiver of the local land office of the district in which the land is situated, an application to purchase the same under the provisions of the act of June 3, 1878, familiarly known as the "Timber and Stone Act." The Register and Receiver rejected complainant's application on the ground that the land was subject to the prior selection thereof by the Railway Company; and this action of the Register and Receiver was affirmed on appeal. The Railway Company's selection was ultimately approved by the Secretary, and a patent for the land was duly issued to it.

After the issuance of patent to the Railway Company and the conveyance of the land to the defendants, complainant brought this suit. The Court of Appeals held, independently of other questions in the case, that complainant did not occupy a status which enabled him to question the patent

title in the courts; and affirmed the decree dismissing the bill without determining whether the officers of the Land Department ought to have accepted complainant's application and permitted him to purchase the land.

This case was submitted to and decided by the Circuit Court and the Court of Appeals at the same time with another case in which Herbert H. Hoyt was complainant and the defendants in this case were defendants; and that case is now before this court on appeal by the defendants under the title of Frederick Weyerhaeuser and John A. Humbird, appellants, v. Herbert H. Hoyt, appellee (No. 195 on the present calendar.) We shall have occasion to refer frequently in this brief to that case, and for brevity we shall refer to it as the "Hoyt case" and to this as the "Campbell case."

The Circuit Court held in favor of the defendants in both cases. The Court of Appeals held in favor of the defendants in the Campbell case, but against them in the Hoyt case; in the latter case reversing the decree dismissing the bill, and directing the entry of a decree in favor of the complainant.

The Hoyt case is in some respects similar to this, the Campbell case, and there are a number of questions common to both cases. But there are also important elements of difference between them—the Hoyt case involves questions which are not present in the Campbell case, and the Campbell case involves the very important question upon which the decision of the Court of Appeals was based, which is not in the Hoyt case at all.

Most of the questions common to both cases are discussed in the brief which will be filed herein by Mr. Charles W. Bunn, with whom we are associated as counsel for defendants in this case; and we do not intend to retraverse the ground covered by Mr. Bunn's brief. Our purpose is to confine this brief to the question peculiar to the Campbell case (which is the question that the Court of Appeals deemed decisive of the case); and to a discussion of two or three points common to both cases, supplementing, but not reiterating, the arguments in Mr. Bunn's brief.

We think it essential to a proper appreciation of the issues in this case that the court should consider the issues in the Hoyt case in their relation to those of the Campbell case. And we believe that a clearer understanding of the situation will be given by a statement of the facts of the Campbell case, followed by a statement of the points wherein the Hoyt case differs from this. But as we do not intend to argue all the questions which this case may possibly be held to involve, and as the other briefs to be filed will doubtless contain full statements of the facts, we think we may properly omit reference to matters which have no possible bearing upon the questions here to be argued.

STATEMENT OF FACTS.

On October 17, 1883, the Northern Pacific Railroad Company duly filed in the United States Land Office at Duluth, Minnesota, its selection list No. 15, whereby it applied to select the lands in controversy in these cases, and a quantity of other lands, as indemnity for specified losses within the place limits of its grant. The list so filed specified the lands lost, by specific description; but did not assign each selection to a particular description of land lost. This was in accordance with the practice of the Department at that time. Subsequently the practice was changed, so as to require a specific loss to be assigned for each tract selected. Thereafter, on April 11, 1893, pursuant to the direction and with the permission of the Secretary of the Interior, the Railroad Company filed a rearrangement of said list No. 15, in which the same bases of lands lost were assigned, but a particular tract lost was assigned as a base for each tract selected. At the time of filing the original list the company tendered and paid the fees required by law. The Register and Receiver accepted and allowed the selections, and attached to the list a certificate which acknowledged receipt of the fees and which contained the following:

> "We hereby certify that we have carefully and critically examined the foregoing list of lands claimed by the Northern Pacific Railroad Company, under the grant to the said company by act of Congress approved July 2, 1864, and joint resolution approved May 31, 1870, and selected by said Northern Pacific Railroad

Company by Chas. B. Lamborn, the duly authorized agent, and we have tested the accuracy of said list by the plats and records of this office, *and that we find the same to be correct; and we further certify that the filing of said list is allowed and approved*, and that the whole of said lands are surveyed public lands of the United States, and within the limit of 40 miles on each side; and that the same are not, nor is any part thereof returned and denominated as mineral land or lands, nor claimed as swamp lands; nor is there any homestead, pre-emption, state or any other valid claim to any portion of said lands on file or record in this office." (Record, p. 2.)

The final approval of the selections by the Secretary of the Interior necessarily involved an affirmance of the findings of the Register and Receiver embodied in the foregoing certificate; indeed, the approval by the Secretary is based upon express findings to the same effect, made by the various examiners and chiefs of division and approved by the Commissioner (Record, pp. 93-96).

These selections were held up for many years, at first because of controversy as to whether Duluth or Ashland was the eastern terminus of the Northern Pacific grant, and later because of the contests waged in the Department by Campbell and other claimants. Meanwhile the Northern Pacific Railway Company succeeded to the rights of the Railroad Company under these selections, by foreclosure proceedings and judicial sale, and its successorship was in time duly recognized by the Interior Department, under advice of the Attorney General of the United States. Finally, on November 10, 1905, the selection of the land in controversy in

the Campbell case was approved by the Secretary of the Interior (Record, pp. 93-96), and on November 13, 1905, a patent for the land was duly issued to the Railway Company (Record, p. 89); which had theretofore conveyed the land to the defendants by warranty deed. The selection of the tract involved in the Hoyt case was approved and patent issued some weeks earlier.

On Ocober 26, 1895, the complainant presented to the Register and Receiver of the local land office an application to purchase the land in controversy under the act of June 3, 1878—the Timber and Stone Act. The Register and Receiver rejected the application on the ground that the land was already subject to the selection thereof previously made by the Railway Company. For the purpose of this argument, it may be conceded that Campbell possessed the necessary qualifications, that his application was in proper form, and that but for the prior selection of the land by the Railway Company it would have been open to purchase under that act and complainant's application should have been allowed. The bill also alleges that Campbell "renewed" his application on November 9, 1896, and again on December 28, 1897, but that on each occasion his application was rejected by the Register and Receiver on the same ground as before.

In order that the issue of law which we propose to discuss may be clearly defined, we state here that the arguments in this brief will proceed upon the assumption that if the prior selection of this

land by the Railway Company did not operate to withdraw or segregate it as against other claims subsequently initiated, and if, notwithstanding such selection, the land was still to be regarded as part of the unappropriated public domain, open to entry or settlement by any qualified person, then the action of the Register and Receiver was erroneous; otherwise complainant's application was rightly rejected.

Complainant appealed to the Commissioner of the General Land Office from the decision of the Register and Receiver rejecting his original application, but he took no appeal from the action of those officers on the successive "renewals" of that application. On August 31, 1900, the Commissioner filed a decision affirming the rejection of complainant's application. Action on that decision was suspended for a time; but on October 3, 1901, the Commissioner filed another decision finally rejecting the application (Record, pp. 4-8, 27-30).

Complainant appealed to the Secretary of the Interior, who, on September 6, 1905, rendered a decision affirming the action of the Commissioner and of the Register and Receiver. That decision was made upon the authority of the previous decisions of the Secretary in the cases of Eaton v. Northern Pacific Railway Company, 33 L. D. 426, and Jones v. Northern Pacific Railway Company, 34 L. D. 105. (Record, pp. 8-9). The opinion of the Secretary in the case of Jones v. Northern Pacific is printed in the record in this case (Record, pp. 30-38).

This suit was commenced November 16, 1905, in the District Court of St. Louis county, Minnesota, whence it was removed by defendants to the United States Circuit Court. Complainant concludes his bill of complaint with the following prayer for relief:

> "Wherefore, this plaintiff prays that this Honorable Court by its decree will adjudge and decree that the patent issued by the United States to the Northern Pacific Railway Company was so issued under a mistake of law, *and that said patent be delivered up and cancelled; and that the plaintiff may proceed to final proof for the land* here in controversy; and that all persons claiming or to claim by or under the defendants be forever barred and enjoined from claiming any title, right or interest in said land adverse to this plaintiff, and for such other and further relief as may be just." (Record, p. 26)

Complainant further prayed an injunction *pendente lite* against the cutting of timber on the land.

It appears affirmatively upon the face of the bill of complaint, as well as from the evidence, that complainant never tendered payment for the land at the local land office or elsewhere, and that he never offered to make the proofs required by law. He rested solely upon his declaratory statement or application, rejected by the local land officers; and neither before nor after the adverse decisions by the Commissioner and Secretary did he make any effort to comply with the requirements as to proof and payment which are necessary prerequisites to the acquisition of land under the Timber and Stone Act. Complainant alleged in his bill that he

> "has at all times been ready and willing to perfect his title to said land by doing all things that the law requires of him, including the payment for the land; and would long ago have completed his entry by payment had he not been prevented from so doing by reason of conflicting claims to the same, etc." (Record, p. 9)

But this is a very different thing from performance of the conditions which are essential to the acquisition of land under the public land laws, and very different from an actual *tender* of proofs and payment. Indeed, there is neither allegation nor evidence that complainant was ever *able* to make proof or payment. The allegation quoted above is the only thing in the bill which bears upon that subject, and all the evidence on the point is comprehended in the following questions and answers in the course of the examination of complainant, by his own counsel, as a witness in his own behalf:

> "Q. Have you at all times since your application in 1895 for this land been ready and willing to complete your entry by paying the amount the Government required for acquiring that land? A. Yes, sir.
>
> Q. Why have you not completed your entry? A. Well, because I couldn't. I had contest on the land and before I got that off I couldn't do anything after that.
>
> Q. Couldn't do anything on account of an order from the Department that nothing further should be done in such cases? A. Yes, sir." (Record, p. 80)

In short, it not only appears affirmatively that there was no offer or tender of proof or payment, but there is also neither allegation nor evidence that the complainant was ever in position to make such proof or payment.

So far as concerns the questions to be argued in this brief, the essential difference between the Hoyt case and the Campbell case is this: On December 17, 1897, Hoyt's grantor, Jones, made a similar application to purchase, under the Timber and Stone Act, the land involved in that case. But instead of rejecting his application, the Register and Receiver received and allowed it; and on March 22, 1898, Jones was permitted to make final proof in the usual manner. Subsequently, on December 10, 1898, Jones paid the full purchase price for the land required by the provisions of the Timber and Stone Act, and the usual final receipt was issued to him. It is true that across the face of the receipt was written a memorandum to the effect that the receipt was issued "subject to any claim the Northern Pacific Railroad Company may have to the lands herein described"; but in other respects the receipt was in usual form. (See opinion in Hoyt case; Hoyt v. Weyerhaeuser, 161 Fed. 324, 326.)

Campbell's application was rejected when proffered, and he never made any offer of the requisite proofs and never paid or tendered payment of the required purchase price; while Hoyt's grantor made the necessary proofs and payment and obtained a final receipt, so that nothing remained to be done on his part to entitle him to patent in case the land was open to his entry at the time it was made.

The distinction between the cases, and the ground upon which the Court of Appeals denied complainant relief, is thus stated by Judge Sanborn, in delivering the opinion of that court (Campbell v. Weyerhaeuser, 161 Fed. 332):

"The facts of this case differ from the facts in that (the Hoyt) case in this: In Hoyt's case his remote grantor Jones entered, purchased and paid for his land * * * before its selection by the Railway Company had been approved by the Secretary of the Interior. In this case the complainant Campbell repeatedly filed with the Land Department his application to enter the land * * * before the Railway Company's selection of that land was approved by the Secretary of the Interior, but the officers of the Land Department rejected his application each time and refused to permit him to enter the land. In Hoyt's case Jones became the vendee of the United States, paid for and became the equitable owner of his land. In this case Campbell was refused permission to purchase the land he seeks, he never entered or paid for it, his right to buy it was never recognized by the United States, and he was never in privity with it. The difference is radical and fatal to this suit in equity. One who has never by acceptance of a grant, or by settlement and improvement, or by occupation, or by entry, or by payment, placed himself in privity with the United States in title before a patent issues to another, may not maintain a bill in equity to charge the title under the patent with a trust in his favor (Citing Smelting Co. v. Kemp, 104 U. S. 636, 647, and other authorities). The indispensable basis of a suit in equity to charge the legal title to land under a patent is an equitable interest in the land in the complainant which is superior to the legal title in the defendant."

And it was held accordingly that Campbell's bill was properly dismissed. But in the Hoyt case, on the contrary, Hoyt was held entitled to a decree.

(Note: The italics in quotations appearing in this brief are ours, unless the contrary is expressly indicated.)

ARGUMENT.

I.

THE COMPLAINANT DOES NOT OCCUPY A POSITION WHICH ENABLES HIM TO ATTACK THE PATENT TITLE, EVEN IF IT SHOULD APPEAR THAT HIS APPLICATION TO ENTER THE LAND WAS WRONGFULLY DENIED AND THAT PATENT OUGHT NOT TO HAVE ISSUED TO THE RAILWAY COMPANY.

In the sequence of argument which seems to us most natural and convenient, we shall first present the considerations and authorities in support of the conclusion reached by the Court of Appeals that the complainant did not occupy a status such as enabled him to question the patent title in this suit.

As the principal authority for its decision, the Court of Appeals cites the great leading case of Smelting Co. v. Kemp, 104 U. S. 636, 640, 647. In that case Mr. Justice Field said:

> "The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and, as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands, under the law, is intrusted that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law. * * * If in issuing a patent its officers took mistaken views of the law, or drew erroneous conclusions from the evidence, or

> acted from imperfect views of their duty, or even from corrupt motives a court of law can afford no remedy to a party alleging that he is thereby aggrieved. He must resort to a court of equity for relief, and even there his complaint cannot be heard unless he connect himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent; and he must possess such equities as will control the legal title in the patentee's hands. Boggs v. Merced Mining Co., 14 Cal. 279, 363. It does not lie in the mouth of a stranger to the title to complain of the act of the Government with respect to it. If the Government is dissatisfied, it can on its own account authorize proceedings to vacate the patent or limit its operation."

But there are other authorities, not referred to by the Court of Appeals, which furnish stronger support for its decision than the case specifically cited in the opinion. The leading case on this question is probably Bohall v. Dilla, 114 U. S. 47, although Sparks v. Pierce, 115 U. S. 408, and Lee v. Johnson, 116 U. S. 48, are cases as closely in point which are cited only less frequently than Bohall v. Dilla. In that case Justice Field said, on page 51:

> "To charge the holder of the legal title to land under a patent of the United States as a trustee of another, and to compel him to transfer the title, the claimant must present such a case as will show *that he himself was entitled to the patent from the Government*, and that in consequence of erroneous rulings of the officers of the land department upon the law applicable to the facts found it was refused to him. It is not sufficient to show that there may have been error in adjudging the title to the patentee. *It must appear that by the law*

properly administered the title should have been awarded to the claimant. Smelting Co. v. Kemp, 104 U. S. 636, 647; Boggs v. Merced Mining Co., 14 Cal. 279, 363. It is therefore immaterial for the decision of this case what our judgment may be upon the conclusion of those officers as to the possession of the patentee."

In Sparks v. Pierce, 115 U. S. 408, 413, it is said:

"To entitle a party to relief against a patent of the government, he must show a better right to the land than the patentee, such as in law should have been respected by the officers of the land department, and being respected, *would have given him the patent.* It is not sufficient to show that the patentee ought not to have received the patent. *It must affirmatively appear that the claimant was entitled to it*, and that in consequence of erroneous rulings of those officers on the facts existing it was denied to him. Bohall v. Dilla, 114 U. S. 47, 51."

In Lee v. Johnson, 116 U. S. 48, 50, the court said:

"He (the plaintiff) must in all cases show that but for the error or fraud or imposition of which he complains *he would be entitled to the patent.* It is not enough to show that it should not have been issued to the patentee. It is for the party whose rights are alleged to have been disregarded that relief is sought, not for the government, which can file its own bill when it desires the cancellation of a patent unadvisedly or wrongfully issued. Bohall v. Dilla, 114 U. S. 47, Sparks v. Pierce, 115 U. S. 408."

In Steel v. Smelting Co., 106 U. S. 447, 454, Mr. Justice Field said:

> "So with a patent for land of the United States, which is the result of the judgment upon the right of the patentee by that department of the government to which the alienation of the public lands is confided, the remedy of the aggrieved party must be sought by him in a court of equity, if he possess such an equitable right to the premises *as would give him the title if the patent were out of the way.* If he occupy with respect to the land no such position as this, he can only apply to the officers of the government to take measures in its name to vacate the patent or limit its operation."

In all of the decisions cited above the conclusions announced represent the unanimous judgment of the court and we cannot learn that these views have ever been criticised or departed from.

Upon the foundation of these authorities a great body of decisions has been built up in the State and Federal courts, in which the principle that the title derived under patent for land over which the Interior Department has jurisdiction can only be attacked by direct proceeding in equity, and then only at the suit of one who has himself performed all the conditions necessary to entitle him to patent, has been recognized, extended and applied.

In Peabody Gold Mining Co. v. Gold Hill Mining Co., 106 Fed. 241, Judge Morrow, after citing and quoting from some of the cases cited above, said:

> "It is alleged that said patent was fraudulently obtained from the land department * * * But nowhere does it appear that the complainant would have been, at the time of the issuance of the patent, or would now be, entitled to the patent itself. * * * Con-

> ceding for the sake of the argument that the complainant could show that the patent should not have been issued to the respondent, this fact would not be sufficient and would not avail without the additional showing that the patent should have been issued to the complainant."

In Baldwin v. Keith, 13 Okla. 624, 75 Pac. 1124, the syllabus, which is prepared by the court itself, thus states the point decided:

> "In an action to declare a resulting trust, where the plaintiff claims the land under the homestead laws, an essential averment of the petition, and one without which the petition does not state a cause of action, is that the plaintiff has resided upon, cultivated, and improved the land *for a period of time and to an extent that upon final proof he would be entitled to a patent thereto.* It is not sufficient that the patentee ought not to have received the patent. It must affirmatively appear from the allegations of the petition that the claimant was entitled thereto, and that, in consequence of the erroneous rulings of the Secretary of the Interior on the facts existing, it was denied him."

In the opinion the court says:

> "However, * * * it is quite obvious that the plaintiff in error cannot maintain this action, because of one elementary principle underlying all actions to declare a resulting trust. That is: 'To entitle a party to relief against a patent of the government of the United States, he must show a better right to the land than the patentee, such as in law should have been respected by the officers of the Land Department, and being respected, would have given him the patent. It is not sufficient to show that the patentee ought not to have received the patent. It must affirmatively appear that the claimant was entitled to it, and that, in consequence of the erroneous rulings of those

officers on the facts existing, it was denied him.' Bohall v. Dilla, 114 U. S. 47, Sparks v. Pierce 115 U. S. 408, Parker v. Lynch, et al., 7 Okla. 631, 56 Pac. 1082. If we were to concede that the defendant in error had no right to the patent to the land in controversy, by what right can the plaintiff in error contend that he is entitled to a patent thereto? In the petition it is alleged that he made application to file a contest, which contest was not entertained, but was rejected. * * * Again, he made application to enter the land. *This application gave him no vested right*, and particularly when the land was covered by an allotment entry. But it is alleged that the plaintiff in error established a residence upon the land and made improvements thereon. * * * But, notwithstanding this, still the plaintiff in error cannot maintain this action upon the theory that he had established a residence upon the land, *because he had not resided thereon a sufficient length of time to entitle him to a patent therefor*, even though the defendant in error had had no right whatever to the property. The petition does not contain an allegation that the plaintiff in error resided upon the land for any specific time, other than is shown by a copy of the affidavit which was filed before the Secretary of the Interior on the motion for reveiw. * * * But even were we to look at the facts as shown by the copy of the affidavits contained in the record, still the record shows that the plaintiff in error did not reside upon the land for a period exceeding two years. *This would not entitle him to a patent from the government. He had not resided there a sufficient length of time to enable him to make final proof under the homestead laws, and, not being entitled to a patent from the government, he cannot maintain this action to declare a resulting trust.*"

In Chapman v. Quinn, 56 Cal. 266, affirmed in Quinn v. Chapman, 111 U. S. 445, the case was that

of a preemptor who settled on the land and while in residence thereon offered to file his declaratory statement, which was refused on the ground that there was a contest pending between other claimants. This Court afterwards held that this was no ground for refusing to receive Quinn's declaratory statement, but held that the equities were against him. Quinn's status, therefore, was that of a preemptioner who was in actual possession of the land, having settled thereon according to law, but whose application to file thereon had been wrongfully rejected by the land office. The court said:

> "The law under which he claims the right to preempt the land in controversy declares, among other things: 'That prior to any entry being made under or by virtue of the provisions of this act proof of the settlement and the improvement thereby required shall be made to the satisfaction of the register and receiver of the land district in which such lands may lie.' This proof it is essential the defendant should make before *he* (italics by the court) could be entitled to enter the land; and of this proof the register and receiver are the exclusive judges, subject to the supervision and control of their superior officers of the Land Department. The courts have no power to substitute their judgment upon the facts of the defendant's alleged settlement and improvement of the land for that of the officers to whose judgment Congress has confided the determination of those questions. Cases are numerous in which the equitable rights of persons claiming under the preemption laws have been protected by the courts against the legal title acquired by other parties by means of the introduction of false testimony, or other imposition upon the officers of the Land Department, or by the misconstruction by those officers of the law, upon an admitted state of facts. But in all of such cases

> of which we have any knowledge, the party thus protected had connected himself with the title of the government, and thereby acquired some right which, in equity, entitled him to protection. We know of no case where the holder of the legal title under a patent from the government has been compelled by a court of equity to convey that title to one occupying the position of the defendant in the present action. To do so would be to compel the conveyance of the title from the grantee of the government to one who had established no right to purchase the land from the government itself. Nor do any of the cases cited support the position taken by the defendant."

In the course of that opinion the court examined and distinguished a number of the principal cases, most cited as authority, in which the relief sought in the case at bar was granted; showing that in every such case the claimant had himself earned the patent, having performed every act necessary to entitle him to it, and that the land should have been awarded to such claimant in the first instance. This is the distinction which seems to run through all the cases in the books, and is the basis for the rule which the Court of Appeals rightly applied against complainant in the case at bar.

Parsons v. Venzke, 4 N. D. 452, 61 N. W. 1036, affirmed by this court in Parsons v. Venzke. 164 U. S. 89, was a case where the plaintiff's preemption final certificate had been canceled arbitrarily and without notice, upon the ground that the preemptor had not complied with the law as to residence and improvements, and patent for the land

had been issued to another; and the plaintiff undertook to subject the patent title to his alleged superior claims. The court held that if the entry was improperly canceled, the entryman would be protected in equity, but that it was incumbent upon him to show not only that the cancellation was arbitrary, but also that he himself was entitled to patent, *having earned the land by full compliance with all the requirements of law.* The opinion is a very elaborate one, in which many authorities are cited and examined, and in the course of it it is said:

> "Moreover, arbitrary action of the Department in cancelling the entry would not of itself entitle the plaintiff to the relief he seeks. He invokes equity to decree *that he is in equity entitled to the legal title. His position is that he had earned it*, and that the government held it in trust for him, and that the government's grantee also holds it impressed with such trusts. It is not the certificate which entitles him to the legal title. The right to the title comes from compliance with the law. * * * By showing that he had no opportunity to be heard before the Department, the entryman makes out a case for a hearing in court; but as he assumes the attitude of complaining of the action of the Department, he must show that it operated to his prejudice. As he is in the position of claiming the legal title, he must *prove by evidence that he has fully earned the same by an honest compliance with the law. The burden is on him.*"

Power v. Sla, 24 Mont. 250, 61 Pac. 468, presents a very careful opinion in which a large number of authorities are examined. The court says:

"It is incumbent upon them (the claimants against the patent) to show such facts as that it will appear therefrom that they have connected themselves with the original source of title in the government, and that their rights are injuriously affected by the existence of the patent. They must show such equities in themselves as will control the legal title in plaintiff's hands. (Citing numerous cases, including the decisions of this court previously cited in this brief.) Making the statement in another form, the defendants stand in no attitude to question the title of plaintiffs unless by their allegations they present facts showing not only that at the time the patent was issued to plaintiffs they (plaintiffs) were not entitled to it by reason of their failure to perform the conditions required by law, *but also that they themselves have performed all the conditions necessary to entitle them to demand a patent from the government.* The rule is deduced from the cases cited, that after the patent has passed to the entryman, mere strangers will not be heard to question the validity of the proceedings by which the patent was obtained. In such cases the government only can contest its validity in proceedings properly brought to set it aside. * * * The answer, therefore, fails to show that defendants so connected themselves with the government that they may assert title in themselves at the time plaintiff's patent was issued, and that their rights have been injuriously affected by an erroneous application of the law by the officers of the Land Department."

In Parker v. Lynch, 7 Okla. 631, 56 Pac. 1082, 1091, Parker, the complainant, had filed an application to contest the homestead entry of defendant, which application was erroneously denied. It was conceded that the defendant's entry was in fact unlawful, and that if Parker had been permitted

to contest the entry, as he was legally entitled to do, he would have prevailed and would himself have secured the land under the homestead law. But he was denied relief; and the court, fortifying its opinion by liberal quotations from Bohall v. Dilla, Sparks v. Pierce, Lee v. Johnson, and Smelting Co. v. Kemp, *supra*, including all the language quoted from those decisions elsewhere in this brief, said:

> "The real question is, what right has Parker in this land? In order to win he must have a better equity than Lynch. He must have had an interest in the land that would have ripened into a title if the law had been properly administered. It is not sufficient for him to allege that Lynch was disqualified. * * * One who has no interest in the land cannot complain, because he could not be injured by the action of the Government in issuing a patent for the land to another."

Small v. Rakestraw, 28 Mont. 419, 72 Pac. 746, 748, affirmed by this court in Small v. Rakestraw, 196 U. S. 403, was a case very similar in many respects to Parker v. Lynch. The court there cited and applied the rule of Bohall v. Dilla, Smelting Co. v. Kemp, and Boggs v. Merced Mining Co., and quoted from Bohall v. Dilla the precise language which is quoted elsewhere in this brief. And the same rule was declared and applied, on the authority of the same cases, in Graham v. Great Falls Water Power Co., 30 Mont. 393, 76 Pac. 808, and in Gebo v. Clarks Fork Coal Mining Co., 30 Mont. 87, 75 Pac. 859. In the latter case the court said:

> "The very foundation of the rule is that the patent was issued to another when plaintiff

> was justly entitled to it. Then the complaint must show such facts as that it will appear therefrom that she has connected herself with the original source of title in the government, and that her rights are injuriously affected by the existence of the outstanding patent. She must show such equities in herself as will control the legal title in the defendant's hands. Power v. Sla, 24 Mont. 243, 61 Pac. 468; * * * She must show affirmatively that upon her part she did or offered to do *all that was necessary to be done in order to secure the patent*, and upon the doing of which patent should have issued to her, Bohall v. Dilla, 114 U. S. 47; and these in addition to the facts necessary to be shown in order to entitle her to make the filing in the first instance."

A recent case very much in point is Pierson v. Loveland, 16 Idaho, 628, 102 Pac. 340. That case deals with the disposition of certain Carey Act lands by the State Board of Land Commissioners, but, as will be seen from the opinion, the principles applied are those which control the disposition of the public lands of the United States. It appears that Loveland made an entry of the land in controversy but failed to comply with the law, so that his rights became forfeited; whereupon Pierson duly initiated a contest against Loveland's entry and applied to enter the land on his own behalf. The Board of Land Commissioners refused to consider Pierson's contest and rejected his application to enter. Pierson appealed from this decision of the Board, but the court held that an appeal from such a decision would not lie, and that his remedy was by mandamus to compel the Board to hear his contest and allow his application. Meanwhile, the

Board issued a patent for the lands to Loveland's assignee. Before patent was issued Pierson settled on the land, built a house thereon, cleared and cultivated a considerable area, and maintained actual residence thereon until forcibly ejected by Loveland's assignee. After patent had issued Pierson brought a suit in equity to have the patent title impressed with a trust in his favor. The court held that Pierson's contest was well brought and should have been entertained by the Board; that Loveland's entry was forfeited and should have been cancelled under that contest; that Pierson's application to enter the land should have been allowed by the Board; and that had he pursued the proper remedy, by mandamus to compel the Board to act on his contest and application, he must have prevailed—in short, that the Board committed an error of law in rejecting Pierson's contest and application and in awarding the land to Loveland's assignee and issuing the patent to him. Nevertheless the court held, following and applying the rule of the authorities cited above, that Pierson had no standing to question the patent title. It is said:

> "The question for determination is, does the complaint state a cause of action? It is well settled that in an action of this kind, to entitle a party to relief he must show a better right to the land than the patentee, such a right as should have been respected by the officers of the Land Department, and being respected would have given him the patent. Facts sufficient must be alleged to show *that the claimant was entitled to the patent* and that in consequence of erroneous rulings of the land officers on questions of law, the patent was

denied to him. It must contain allegations showing *that the plaintiff has done all of the acts required by law to be done and performed in order to entitle him to the patent*, or, at least, all of the acts which were in his power to do that were required by the law to be done, and offered to do any and all acts required by the law to be done, which he was prevented from doing by reason of the errors of law committed by the officers of the Land Department. It is admitted that the plaintiff was prevented from a hearing on his contest because of an error of law committed by the State Board of Land Commissioners. * * * After the plaintiff's contest was dismissed by said Board, he took an appeal from that action of the Board to the District Court. * * * In that appeal the plaintiff pursued the wrong remedy. * * * Had the plaintiff proceeded in that way (by mandamus) his rights could have been fully protected. As he failed to do that, he has failed to do all that he might have done to protect his rights. * * * He not only failed and neglected to proceed as above indicated, but his counsel admit *that he failed to procure a water right and failed to offer final proof for said land.* As he neglected and failed to do and perform those things, he is not in a position to maintain this action, for under the well settled rule of law in this class of cases, the plaintiff must allege *the performance of all the acts required by law necessary to show that he was entitled to the patent at the time the action was commenced*, with the exception of those acts which he was prevented from performing or offering to perform by reason of the error of law committed by said Board. In Bohall v. Dilla, 114 U. S. 47, the court had under consideration a case something like the one at bar, and said: 'To charge the holder of the legal title to land under a patent of the United States, as a trustee of another, and to compel him to transfer the title, the claimant must present such a case as will show that he

himself was entitled to the patent from the government, and that, in consequence of erroneous rulings of the officers of the Land Department upon the law applicable to the facts found, it was refused to him. It is not sufficient to show that there may have been error in adjudging the title to the patentee. It must appear that by the law properly administered the title should have been awarded to the claimant.' Even if the State Board had not made an error of law, it does not appear from the allegations of the complaint that the appellant would have been entitled to receive a patent for said land at the time patent was issued to Diehl, he not having complied with the part of the law requiring him to present his final proof showing certain facts, and showing that if he had not complied fully with the law that his reason for non-compliance was the errors in law committed by the Board in granting said extension of time. The case of Sparks v. Pierce, 115 U. S. 413, involved the question of relief in equity against a patent issued by the United States, and the court there held, as follows: 'To entitle a party to relief against a patent of the government, he must show a better right to the land than the patentee, such as in law should have been respected by the officers of the Land Department, and being respected would have given him the patent. It is not sufficient to show that the patentee ought not to have received the patent. It must affirmatively appear that the claimant was entitled to it, and that, in consequence of erroneous rulings of those officers on the facts existing, it was denied to him.' In support of that rule, the court cites Bohall v. Dilla, 114 U. S. 47. See also Quinn v. Chapman, 111 U. S. 448; Lee v. Johnson, 116 U .S. 53; Cunningham v. Ashley, 14 How. 379; Parker v. Lynch (Okla.) 56 Pac. 1082; Baldwin v. Keith (Okla.) 75 Pac. 1124; Jameson v. James (Cal.) 100 Pac. 700."

It will be noted that the Idaho court held that Pierson failed to comply with two different classes of requirements necessary to be observed in order to give him a status which would enable him to attack the patent, viz: not only in his failure to pursue the proper remedy to compel the Board of Land Commissioners to hear his contest and receive his application, but also in his failure to make proper final proofs and to obtain a water right—although it is plain that he was deterred from doing these latter things by the refusal of the Board to recognize his claim. And it was held that a failure in either respect was enough to bar an attack upon the patent title, even had the other requirement been complied with. This answers the suggestion, should it be made, that the rejection of his initial application to purchase the land relieved complainant from the duty of offering proofs and payment because such offer would be useless in the face of the refusal of the officers of the Land Department to entertain the application. This is a phase of the subject which will receive further consideration elsewhere in this brief.

In Deweese v. Reinhard, 61 Fed. 777, decided by the Circuit Court of Appeals for the Eighth Circuit and affirmed on another ground in Deweese v. Reinhard, 165 U. S. 386, Judge Thayer says:

> "At the threshold of this case we are confronted with the question whether the appellant stands in such privity with the United States as entitles him to maintain a suit to annul the certification of the land in dispute to the State of Nebraska, which act on the part

of the Secretary of the Interior had the legal force and effect of a patent. * * * We do not dispute the general proposition that a person becomes the equitable owner of a tract of land forming a part of the public domain, if it has been surveyed and placed on the market, when he makes prior settlement thereon under the pre-emption or homestead laws of the United States, *and subsequently complies with all of the terms and conditions of those laws which entitle him to a patent.* It may also be conceded that the right of a homestead or pre-emption claimant to a patent, *when he has made a lawful settlement and done everything required of him to perfect his claim*, cannot be prejudiced either by the intentional misconduct of the officers of the Land Department or by their mistakes of law or neglect of duty. Moreover, it may be admitted that the holder of an equitable right or title to a tract of land which has been acquired in the manner aforesaid by a lawful settlement thereon, *and by the performance of such other acts as the law prescribes to entitle a settler to a patent*, stands in privity with the government, in such sense that he may maintain a bill to cancel a patent erroneously issued to a third party for the same land after the settler's rights had become vested."

In Hartman v. Warren, 76 Fed. 157, 163, Judge Sanborn, speaking for the Court of Appeals for the Eighth Circuit, said:

> "Can one who has acquired no right to a tract of land maintain a suit in equity to charge the owner of it with a trust in his favor, because the United States sold and granted it to that owner through an error of law? This is the next question in this case, and it is not a new question in this court. It was carefully considered and answered in the negative in the case of Deweese v. Reinhard, 61 Fed. 777."

Then after some discussion of the authorities the learned judge quoted from Smelting Co. v. Kemp, 104 U. S. 636, 647, the language quoted from that case on a preceding page of this brief, and continued:

> "*This is a wise and salutary rule. It relieves the government of the expense of vexatious litigation, and the owners of the land from the speculative attacks of those who have nothing to lose.* It has been repeatedly announced and uniformly maintained in the national court, and it is fatal to the suit of appellant in this case."

The Circuit Court of Appeals for the Ninth Circuit, in American Mortgage Co. v. Hopper, 64 Fed. 553, 556, an opinion in which Mr. Justice McKenna concurred, said:

> "The appellees relied upon the patent from the government of the United States. The suit is brought to obtain a decree declaring that the appellant is entitled to the patent, which was issued to appellee Hopper. To entitle it to this relief it was essential for it to *affirmatively show* that if the law had been properly administered *the title would have been awarded to it.* The suit cannot be maintained simply upon a showing that the land department erred in adjudging the title to the patentee. These principles are well settled, both in this court and in the Supreme Court of the United States."

In Sacramento Savings Bank v. Hynes, 50 Cal. 195, the defendant alleged, as an equitable defense in a suit founded upon a patent title, that he had the superior right to the land because he had entered it under the preemption law and had complied with all of the requirements of that law, except

those relating to proof and payment; and that he had *offered* to make proper final proof and payment, but was wrongfully refused permission to do so. The court said:

> "The defendant cannot maintain the position that he is entitled in equity to the legal title which was acquired by the plaintiff, unless he, the defendant, *complied with the provisions of the preemption law applicable to his case*, or was prevented from so doing by some act by means of which the plaintiff acquired an undue advantage in the proceeding. Among others is the provision that the claimant must prove, to the satisfaction of the register and receiver, the facts upon which his claim rests. The allegation of the equitable defense that when the defendant appeared before those officers to prove his right of preemption, he was not permitted to make such proof because of the 'wrongful and fraudulent acts of the plaintiff,' is not the allegation of any fact which caused or induced those officers to refuse to hear his proofs. The allegation is too vague to be considered as the allegation of a fact."

Wirth v. Branson, 98 U. S. 118, is one of the cases in which the complainant was held entitled to relief. That case was decided before the rule upon which we rely had been declared and defined by this court in such cases as Smelting Co. v. Kemp, Bohall v. Dilla, Sparks v. Pierce, and Lee v. Johnson. But even then the limitation upon attacks on the patent title, with respect to the status which the complainant must occupy in order to maintain a suit of this character, was recognized by the court; as will appear by the following extracts from the opinion, which was by Justice Bradley:

"The rule is well settled by a long course of decisions that when public lands have been surveyed and placed in the market or otherwise opened to private acquisition, a person *who complies with all the requisites necessary to entitle him to a patent* in a particular lot or tract is to be regarded as the equitable owner thereof. * * * This was laid down as a principle in the case of Lytle v. Arkansas, and has ever since been adhered to. See Stark v. Starrs, 6 Wall. 402. Subsequent cases which have seemed to be in conflict with these *have been distinguished from them by the fact that something remained to be done by the claimant to entitle him to a patent, such as the payment of the price, the payment of the fees of surveying, or the like.* The proper distinctions on the subject are so fully stated in the cases of Stark v. Starrs, Frisbie v. Whitney, The Yosemite Valley Case, Railway Co. v. McShane, 22 Wall. 444, and Shepley v. Cowan, 91 U. S. 330, that it would be supererogation to go over the subject again."

There are a great many cases in the books, in addition to those already referred to, which in some form or other recognize the rule that the patent title to land over which the Interior Department had jurisdiction can only be attacked or questioned by direct proceeding in equity, and then only at the suit of one who has himself performed all the conditions entitling him to patent for the land. Some of these are cases where the complainant was held entitled to the relief sought, but where the rule stated was expressly recognized by the court; others are cases where complainant was denied relief under this rule, although the decision might have been put on a different ground; and still others are cases in which the facts were

such that the rule was properly applied. But everywhere the rule has been accepted by the courts, and we have found no case in which it has been criticised or in which an attempt has been made to limit the rule or restrict its operation. The authority of Smelting Co. v. Kemp, Bohall v. Dilla, Sparks v. Pierce, and Lee v. Johnson has been universally acknowledged, and we cannot learn that the correctness of those decisions has ever been doubted or denied by any court of last resort. The length to which we have already gone forbids further quotation from or discussion of the authorities on this point. We cite below a few additional cases to the same effect which are quite closely in point; but there are many others of more or less direct bearing which we think it unnecessary to give specific reference to:

Jameson v. James, (Cal.) 100 Pac. 700.

Boggs v. Merced Mining Co., 14 Cal. 279.

Doll v. Meador, 16 Cal. 295.

Manning v. San Jacinto Tin Co., 9 Fed. 726.

Savage v. Worsham, 66 Fed. 852.

Carr v. Fife, 44 Fed. 713; affirmed in Carr v. Fife, 156 U. S. 494.

Johnson v. Fleutsch, 176 Mo. 452; 75 S. W. 1006.

Bangs v. Stephenson, 63 Mich. 661, 669; 30 N. W. 317, 320.

Janes v. Wilkinson, 2 Kan. App. 361; 42 Pac. 735,737.

Frisbie v. Whitney, 9 Wall. 187.

The Yosemite Valley Case, 15 Wall. 77.

There are, of course, numerous cases in which the complainant has been held entitled to relief, or an equitable defense has been sustained, where one entitled to public land was deprived of patent thereto by fraud or mistake, or by errors of law on the part of the officers of the Land Department, and thereafter appealed to a court of equity for a decree subjecting the patent title to his superior equitable rights. But, as pointed out in several of the authorities cited above, in every case where such relief has been granted against the patent title, the complainant had performed every act necessary to entitle him to patent, so that nothing remained to be done, as between him and the government, to completely earn the land; every condition precedent to the issuance of patent to him having been complied with before commencement of the suit.

In a sincere effort to exhaust the authorities on the subject, we have examined a great many cases in which the equitable claims of the complainant have been held superior to the patent title; but we have found no such case where anything remained to be done on the part of the complainant to entitle him to patent. Some of the cases may possibly convey a different impression on surface reading; but every such case will be found, upon analysis, to present the conditions indicated. We shall refer to and explain a few of the best known and most cited cases of this character, although these represent a very small proportion of those which have been ex-

amined and which fall within the definition given above.

Johnson v. Towsley, 13 Wall. 72, is probably the leading case. Towsley, the original complainant, entered the land under the preemption law, complied with all the requirements of the law as to residence, cultivation and improvement, made proper final proofs, paid the purchase price, and received the final certificate; so that patent would have been issued to him in the regular course without any further act on his part. His entry was, however, contested by Johnson, who prevailed in the Department and was awarded the patent under a view of the law which the court afterwards held to be erroneous. Towsley remained in possession of the land at all times, and was evidently in possession thereof at the time he brought suit against Johnson. It will be seen, therefore, that Towsley's equitable title was complete, and that nothing whatever remained to be done to entitle him to patent. Cornelius v. Kessel, 128 U. S. 456, and the great case of Lytle v. Arkansas, 9 How. 314, were preemption cases where the conditions were very similar to those considered in Johnson v. Towsley.

Lindsey v. Hawes, 2 Black, 554; McCord v. Hill, 111 Wis. 499, 84 N. W. 27; Bogan v. Edinburgh Land Mortgage Co. (C. C. A. 8th Cir.), 63 Fed. 192; and George v. Riddle, 94 Fed. 689, are cases somewhat resembling Johnson v. Towsley and Cornelius v. Kessel. In each of these cases the complainant complied with all the requirements of law and his proofs and payment were accepted by

the Land Department and final certificate issued to him; but the certificate and entry were afterwards wrongfully cancelled by action of the Department and patent erroneously issued to another.

In Tarpey v. Madsen, 178 U. S. 215, Madsen was the grantee of a railway company, which was entitled to the land under its grant, the Department having erroneously issued patent to a homestead claimant. This court held that patent should have been issued to the railway company, and upheld a decree for Madsen, its grantee. All of the conditions of the grant had been complied with, and the railway company was entitled to patent without any further act on its part.

In Germania Iron Co. v. James, (C. C. A. 8th Cir.) 89 Fed. 811, and James v. Germania Iron Co., (C. C. A. 8th Cir.) 107 Fed. 597, the complainant had entered the land with a Porterfield land warrant. He made proper application, paid the fees required by law, and turned in his warrant; and the application, payment and warrant were duly accepted and the entry allowed by the local land officers. Nothing, therefore, remained to be done to entitle him to patent.

Ard v. Brandon, 156 U. S. 537; Brandon v. Ard, 211 U. S. 11; Duluth & Iron Range Co. v. Roy, 173 U. S. 587; Nelson v. Northern Pacific, 188 U. S. 108; Trodick v. Northern Pacific (C. C. A. 9th Cir.), 164 Fed. 913, Northern Pacific v. Wass, 104 Minn. 411, (now before this court on writ of error), and the very recent case of Osborn v. Froyseth, decided by this court March 14, 1910, are cases of home-

stead claimants who made actual settlement on the land and complied in good faith with all the requirements of law respecting residence, improvement and cultivation, so as to fully earn the land under the homestead law, and who remained in possession of the land at all times up to the commencement of suit. Oregon & California Railway Co. v. United States, 189 U. S. 103, and 116, were cases where the Government brought suit for the benefit of settlers who were in precisely the same position.

In Duluth & Iron Range Co. v. Roy, *supra*, Roy, the claimant, had not completed his full five years residence and cultivation at the time patent was issued to his adversary, and it was held that this was not fatal to his suit; the court declaring that it is not essential that at the moment of time the patent issues, the claimant should have so far completed his performance as then to be immediately entitled to patent. But in that case it appeared that after the patent issued Roy continued to reside upon, cultivate and improve the land, and that the full five-year period elapsed before the suit was commenced; so that *at the time the suit was brought* Roy had fully earned the land under the homestead law. Therefore, the Roy case is right in line with the others cited in the preceding paragraph, and is perfectly consistent with the other authorities referred to in this brief. The Roy case is distinguished upon this general ground in United States v. Chicago, Milwaukee & St. Paul Railway, 195 U. S. 524, 539.

In some of these homestead cases the settler was not permitted to make final proofs, and in one or two cases the settler was deterred by the erroneous action of the officers of the Land Department from filing his preliminary application in the mode prescribed by law. But in all such cases the settler offered or attempted to do the thing omitted, and was prevented from doing so by error of the land officials; and the thing was held immaterial in view of the fact that the claimant had made full compliance with the law in respect to residence, improvement and cultivation, and was then actually occupying the land in good faith as his home. Moreover, the requisite proofs were in fact made as part of the evidence in the suit to establish the rights of the claimant. We think it clear that in each of those cases the claimant had really done everything necessary to entitle him to patent; but if those cases may be regarded as a relaxation of the strict rule, it was a relaxation only in favor of an actual settler who had fully performed the conditions necessary to the acquisition of a home; and reason for this is found in the familiar principle that the law deals tenderly with the settler who in good faith establishes his home upon the public lands and conforms to all the substantial demands of the law, viz: those which call for occupation, cultivation, improvement and continuous residence.

In Morrison v. Stalnaker, 104 U. S. 213, Cunningham v. Ashley, 14 How. 377, and Hess v. Bolinger, 48 Cal. 349, the claimant was a qualified preemptioner who had settled on the land under the pre-

emption law and complied with all the requirements of that law as to residence, improvement and cultivation, and had duly made his final proofs and *tendered* payment of the purchase money, but such tender was refused by the land officials under error of law. In those cases it seems to have been assumed, without discussion, that under the circumstances there shown such tender was equivalent to payment, and the claimant was given relief in equity notwithstanding the tender was not accepted. But in every such case an actual tender of the money was clearly and unequivocally proved, and the claimant was further supported by the fact that he had in all other respects complied with the statute and was an actual settler on the land, which he had cultivated, improved and resided upon in conformity to law, and had made the required proof thereof.

There is as much reason for special leniency towards the actual settler under the preemption law as towards him who claims under the homestead law. The courts have never made any distinction between the two, but have ever shown favor and tenderness towards the rights of both. And this may be the reason why a mere unaccepted tender of payment has sometimes been held sufficient in the case of a preemptioner, just as an unaccepted offer of proofs has been held good in the case of a homesteader, where the complainant was an actual settler in good faith, who had fully satisfied all other conditions, and who was then in residence upon the land.

For we have found no other case where a mere tender of payment or performance has been held sufficient to give the claimant standing to question the patent title. No court, so far as we know, has ever granted this extraordinary equitable relief to a would-be purchaser, not a settler upon the land, who had not paid the purchase money due to the United States under the law, on the ground that payment was excused by tender and refusal. In some cases it is intimated, *obiter dictum*, that tender might be as good as performance to give the status necessary for an attack upon the patent title; but we cannot find that it has ever been so held by any court, except in favor of an actual settler who had in all other respects complied with the law, and then only to the extent indicated in the decisions already cited.

And in no case has anything less than actual affirmative tender of the money been held sufficient to give the complainant the requisite standing against the patent, where his claim was made under a law calling for the payment of a purchase price to the government. The courts have yet to find a cause sufficient to excuse actual tender of the money, in cases where payment is not made and where a right is claimed thereunder as a basis for an attack upon the patent title.

Now we may well concede that even under the timber and stone act, a tender of the purchase money, accompanied by an offer of proper final proofs, which is rejected by the land officials, is enough to give the complainant that privity with the Government which is essential to the maintenance of a suit to control the patent. In this case the complainant Campbell rested upon the rejection of his application, and made no effort whatever to comply with the law with respect to proof and payment. It is not pretended that he made any atttempt to tender the purchase money or the required proofs; nor is it even claimed that he was prevented from doing so by any action of the officials of the Land Department. Indeed, a peculiar weakness of Campbell's case is that there is neither allegation nor proof that he was ever *able* to pay the purchase money or make the necessary proofs.

The theory upon which Campbell proceeds is that, his application having been rejected, it was useless for him to go further; that the rejection of the application indicated that had proofs and payment been tendered the tender would probably have been refused; and that such rejection excused him from making any further offer of payment or performance.

That theory is incorrect in law, as we have shown. It is not at all certain that even a tender of proofs and payment would have been enough to give complainant's claim the required status, but it is perfectly clear that nothing less than an actual tender is sufficient. There is no presumption that the

land officials would not have done their duty—it cannot be assumed, as a matter of law, that they would not have accepted a proper tender properly made. Indeed, if we may conjecture as to the possible event, the acceptance of a similar tender in the Hoyt case makes it seem very probable that such a tender would have been accepted in the Campbell case also. But of course this is immaterial, for the question is not one to be tested by ordinary rules of conduct nor by principles of law applicable to ordinary commercial transactions. It is a question which must be determined in the light of the rules that have been built up for the safety and protection of those holding under patent from the Government; and in the light of those rules it is manifest that complainant has not performed those conditions necessary to give him standing to attack the patent title.

There is nothing in Campbell's situation which entitles him to particular consideration from a court of equity or which furnishes any reason for special leniency towards his failure to perform the prescribed conditions. Campbell was not a settler, but a speculator. He never lived upon the land and never intended to do so. He risked nothing, paid nothing, invested nothing. His only expenditure of time or money has been in the litigation conducted by him in the Department and the courts.

Campbell's position is very different from that of a settler who has spent several years of his life in establishing a home upon a tract of public land, and who has put his savings and the fruit of his labor into buildings and other improvements, and has enhanced the value of the land by clearing and cultivation; especially one who has done this in ignorance of adverse claims and in the honest belief that the land was subject to his entry—which was true of the successful complainant in most of the cases cited above.

Campbell was a mere speculator, and he had full knowledge of the Railway Company's rights. He made his initial application, and conducted his contest in the Department, well knowing that the land had previously been selected by the Railway Company, in the hope that such selection would be defeated in law and the land be subjected to his entry. He went into the venture with eyes open and with full knowledge of its hazards. Had he done so in the honest effort to secure and establish a home, we might feel some sympathy for him. As it is,

he is entitled to no more consideration than any other unsuccessful speculator.

In this connection the language of Mr. Justice Brewer in Moss v. Dowman, 176 U. S. 413, 417, and in Gertgens v. O'Connor, 191 U. S. 237, 246, in each case expressing the unanimous judgment of the court, is especially pertinent. In Moss v. Dowman, Mr. Justice Brewer said:

> "While undoubtedly under the provisions of the statutes and the regulations of the Land Department there are at times opportunities for a speculator to obtain title to public lands, it must be always remembered that *in the eye of the public land laws of the United States the speculator is never an object of favor.*"

And in Gertgens v. O'Connor, he said:

> "It is well to look further into his (the settler's) equities. It will be borne in mind that he did not go on the land until April, 1891. The tract was within the indemnity limits of the company's grant, and was therefore subject to selection. It had been withdrawn from entry under the land laws, and that fact appeared on the records of the local land office. It had in fact been selected by the Company, and that selection had not been cancelled. * * * He does not come within the letter of the statute, nor does he come within the reach of any reasonable equities. *He evidently took his chances on the possibility of the Company's failing to obtain title and a subsequent failure of Ireland to insist upon his preferential right of purchase. He went upon the land with full knowledge of all the facts, which showed that he had no right to enter, speculating upon possibilities which have not been realized, and having so speculated, he cannot complain if he suffer the consequences which often attend the failure of a speculation.*"

In Gertgens v. O'Connor the claimant to whom the quoted language applies was an actual settler who had cultivated and improved the land. The reasoning of that case therefore applies with greater force to a speculator like Campbell, who put nothing at risk and sustains no loss through his failure to acquire the land, except the loss of a profit he might have made.

In Manning v. San Jacinto Tin Co., 9 Fed. 726, 732, cited on a preceding page of this brief, the court said:

> "But complainant has no standing to impeach the transaction on another ground. He has no apparent title from the United States. His right, whatever it may be, is, at best, only inchoate. It is a mere privilege; a first right to purchase or pre-emption right under the acts of Congress, of which he may avail himself or not as he chooses if he should succeed in vacating the patent. *He is not bound to purchase of the Government, and may abandon his claim at any moment. Neither he nor his grantor has ever tendered the purchase money to the United States* or to defendant, or applied for a patent, and it so appears in the bill, and *non constat* that he ever will do either. He is in no better position as regards title, in his relation to the Government, than the parties in Hutton v. Frisbie, and Frisbie v. Whitney, 9 Wall. 187. Complainant as yet has no privity with the government in the lands in dispute, and no ground for equitable relief on that score. Doll v. Meador, 16 Cal. 295."

This language is singularly apposite to the case at bar. Like the complainant in that case, Camp-

bell "has never tendered the purchase money to the United States." Like that complainant, "he is not bound to purchase of the Government, and may abandon his claim at any moment." To give Campbell in this suit the benefit of the patent which was granted by the Government to the Railway Company, under which defendants now hold, is to give him something which he never paid for and never tendered payment for; to give him the benefit of an *option*, a speculation, in which he never put a penny at risk, and from which he might have withdrawn at any time, and may still withdraw, without having invested or lost a dollar, should events occur (such as the destruction by fire of the timber on the land) which would make the speculation appear unprofitable. This is something a court of equity should not do. In this view also, the fact that Campbell has not alleged or proved that he was ever able to pay the purchase money is quite significant.

Campbell cannot complain that there is anything novel in the doctrine which forbids him from maintaining this suit. For years the decisions of the Land Department have marked a clear distinction between the rights of an applicant under the timber and stone law whose application is rejected or suspended, and who makes no further effort to comply with the law, and the rights of one who, notwithstanding such rejection or suspension, offers the proper proof and tenders payment of the purchase money, even though the tender is refused. And those decisions, read in the light of the rule estab-

lished by this court in such cases as Smelting Co. v. Kemp, Bohall v. Dilla, Sparks v. Pierce and Lee v. Johnson, made it absolutely plain that if Campbell would thereafter appeal to a court of equity to subject the patent title to his alleged superior claims, he must establish his status by making the necessary proof and payment, or at least by making an actual unqualified tender thereof. This Campbell did not do, and the omission is fatal to his suit, even if all other questions might be resolved in his favor.

Burns v. Bergh's Heirs, 37 L. D. 161.
Heirs of William Friend, 5 L. D. 38.
Capprise v. White, 4 L. D. 176.
California v. Nickerson, 20 L. D. 391.
Board of Control v. Torrence, 32 L. D. 472.
Jones v. Northern Pacific, 34 L. D. 105, 111.

If there is any seeming harshness in this rule, it is more apparent than real. The remedy of a suit in equity to control the patent title is an extraordinary remedy, which is not founded on statute, but which has been built up by the courts, year by year, decision by decision. It is extraordinary in that it permits re-examination of a final adjudication by the tribunal which is vested with the jurisdction to determine the very questions thus re-examined. And as the courts have built it up by their decisions, so they have defined it and limited its scope. Manifestly, it would not do to extend this remedy to all cases where an individual might find it to his interest to challenge a patent issued to another. Its use must be limited to those having a real and definite interest to be protected; such an interest as courts of equity generally take cognizance of. And so it was established that the remedy might be invoked only by one whose equitable interest was of a dignity equivalent to that of ownership. It was necessary that the line should be drawn somewhere, and it has consistently been drawn against claims which had not been carried far enough to give a right to patent. Again and again it has been held that the patent could be attacked in this manner only by one who was himself entitled to patent. The rule is firmly established, and it has never been departed from. And who shall say that it is not a just and reasonable rule? But whatever may be said with respect to the propriety of the rule—*it is the law!*

In delivering the opinion of the Court of Appeals in the case at bar, Judge Sanborn well said:

> "The indispensable basis of a suit in equity to charge the legal title to land under a patent is an equitable interest in the land in the complainant which is superior to the legal title in the defendant. The right under the general land laws of every qualified citizen to enter any tract of land open to entry thereunder is not, and no one can convert it into, such an interest in land by making an application to purchase which the officers of the Land Department unlawfully deny. The right to allowance of such an application is a privilege merely, and not an equitable interest or title. The applicant acquires no equitable interest in the land by his application and its denial, and in the absence of such an interest no suit in equity can be maintained. * * * The applicant pays nothing for the tract he is refused permission to buy, his loss by the refusal is measurable in damages, he may purchase another tract, *and if courts of equity should entertain suits upon such applications and denials, they would become courts for the production, rather than the prevention, of a multiplicity of suits.*"

In Hartman v. Warren (C. C. A. 8th Cir.), 76 Fed. 157, 164, the same judge, referring to Smelting Co. v. Kemp, 104 U. S. 636, 647, where this principle was first clearly declared, said:

> "This is a wise and salutary rule. It relieves the Government of the expense of vexatious litigation *and the owners of land from the speculative attacks of those who have nothing to lose.* It has been repeatedly announced and uniformly maintained in the federal courts."

The brief to the court on behalf of the complainant Campbell quite ignores the ground upon which the Court of Appeals rested its adverse decision. The reasoning of the Court of Appeals is not referred to in that brief, nor is it suggested that such reasoning was unsound or that the position taken by the Court of Appeals is not sufficiently supported by the authorities cited. The assignments of error which were printed as a part of complainant's brief contain nothing to indicate an intent to reargue in this court the question on which the case was disposed of by the Court of Appeals. Therefore, we are somewhat at loss to know what position complainant's counsel proposes to take.

But from the arguments made to the Court of Appeals, and from the assignments of error filed in that court on the appeal to this court (Record, p. 190), it seems probable that complainant's counsel will argue that if complainant is not entitled to a decree adjudging defendants to hold the patent title in trust for him (and we surmise that this will be conceded in the light of the authorities marshalled above), he is at least entitled to a decree cancelling the patent and permitting him to complete and perfect his entry. This was undoubtedly the theory upon which the suit was brought, since it is the specific relief prayed in the bill of complaint (although it is true that the prayer for general relief would have entitled complainant to a broader decree if warranted by the facts and the law), and it was the theory upon which complainant's counsel presented his case to the Court of Appeals.

But if complainant is not entitled to a decree declaring the patent title impressed with a trust in his favor and requiring the defendants to transfer the title to him, or something of equivalent import, then complainant is not entitled to a decree at all. For it is well settled that a suit to cancel the patent and restore the land to the jurisdiction of the Land Department cannot be maintained by an individual, but only by the Government itself.

The rule is exactly stated by Judge Morrow of the Ninth Circuit in Peabody Gold Mining Co. v. Gold Hill Mining Co., 106 Fed. 241, 243, thus:

> "The mere cancellation of the patent with the reversion of the land to the Government is not within the province of a private party to effect by a suit in equity; that privilege rests only with the Government."

The first case in which this question was discussed seems to be Silver v. Ladd, 7 Wall. 219, 228, where Mr. Justice Miller said:

> "The relief given in this class of cases does not proceed upon the ground of annulling or setting aside the patent wrongfully issued. That would leave the title in the United States, and the plaintiff might be as far from obtaining justice as before. And it may well be doubted whether the patent can be set aside without the United States being a party to the suit. The relief granted is founded on the theory that the title which has passed from the United States to the defendant, inured in equity to the benefit of plaintiff, and a court of chancery gives effect to this equity."

In Smelting Co. v. Kemp, 104 U. S. 636, 647, Mr. Justice Field said:

> "It does not lie in the mouth of a stranger to the title to complain of the act of the Government with respect to it. If the Government is dissatisfied, it can on its own account authorize proceedings to vacate the patent or limit its operation."

In Steel v. Smelting Refining Co., 106 U. S. 447, 454, the same great judge stated the point clearly in the following terms:

> "The remedy of the aggrieved party must be sought by him in a court of equity, if he possesses such an equitable right to the premises as would give him the title if the patent were out of the way. If he occupy with respect to the land no such position as this, he can only apply to the officers of the Government to take measures in its name to vacate the patent or limit its operation. * * * This can be accomplished only by regular judicial proceedings taken in the name of the Government for that special purpose."

In Lee v. Johnson, 116 U. S. 48, he said:

> "He (the plaintiff) must in all cases show that but for the error or fraud or imposition of which he complains he would be entitled to the patent; it is not enough to show that it should not have been issued to the patentee. It is for the party whose rights are alleged to have been disregarded that relief is sought, not for the Government, which can file its own bill when it desires the cancellation of a patent unadvisedly or wrongfully issued."

In Carr v. Fife, 44 Fed. 713, affirmed in Carr v. Fife, 156 U. S. 494, Judge Hanford said, of a suit of similar nature:

> "This is not a suit to destroy the title conveyed by the patent. The plaintiff's object is rather to acquire that title for himself. Unless he can succeed in this, it matters naught

to him in what manner or to whom the Government disposes of the land."

The most recent authority is Jameson v. James, 100 Pac. 700, decided by the Supreme Court of California in March, 1909, which has already been cited in another connection. That case is exactly in point. The plaintiffs had initiated a mineral claim to the land in dispute, and had in all respects complied with the law up to the time patent was issued to the defendant; but they had not made the complete compliance necessary to entitle them to patent. It appeared that the patent was obtained by fraud and in derogation of the rights of the plaintiffs. After examining the facts and authorities, the court concluded that the plaintiffs had not made such compliance with the law as to entitle them to control the patent title within the rule of cases like Bohall v. Dilla, Sparks v. Pierce, Lee v. Johnson, and Smelting Co. v. Kemp, *supra*, and then considered whether the plaintiffs were entitled to have the patent set aside in order that they might complete their claims—which was the relief prayed in the complaint. In this connection the court said:

"In the case at bar the plaintiffs do not seek to have the defendants held as trustees of the legal title conveyed by the patent. * * * It is not claimed by appellants (plaintiffs) that they * * * occupied 'such a status as entitled them to control the legal title.' They had never performed the acts necessary to vest in them the right to a patent. * * * The plaintiffs, then, not being themselves entitled to acquire title to the land, ask that the patent conveying it to defendant James be cancelled.

> That a patent obtained by fraud may be so cancelled is well settled; but inasmuch as the party injured by the fraud is the Government, whose title has been improperly obtained, *the action to annul the patent can be maintained by the United States alone.* A complainant in the position of these plaintiffs must, as is said in Steel v. St. Louis Smelting Co., (106 U. S. 447,) 'apply to the officers of the Government to take steps in its name to vacate the patent or limit its operation. This can be accomplished only by regular judicial proceedings taken in the name of the Government for that special purpose.' "

It is suggested in one of the briefs that the decision of the Court of Appeals in the Hoyt case rests upon the ground that the acceptance of Hoyt's application, proof and payment deprived the Department of jurisdiction, and that the subsequent approval of the Railway's Company's selection and the issue of patent to it were without jurisdiction and absolutely void. Now if the patent to the Railway Company were void for want of *jurisdiction* in the Department to issue it, it might be attacked collaterally or in an action at law; it is only a patent for land over which the Department had jurisdiction that is impervious to collateral attack and cannot be questioned except by direct proceeding in equity at the suit of one who is himself entitled to patent. And while it is not claimed that the decision in the Hoyt case involves a ruling that the Department was without jurisdiction to approve the selection and issue the patent to the Railway Company in the Campbell case, so that the

question is really immaterial in this case, it may possibly cause some misunderstanding; and as it is easily disposed of, it seems best to get it out of the way.

We do not think the Court of Appeals can rightly be understood to have put its decision upon the ground indicated; indeed, it seems to us that this idea is expressly excluded by the language of the opinion itself. See Hoyt v. Weyerhaeuser, 161 Fed. 324, 330. At all events, the theory that the Department can be deprived of jurisdiction by the acceptance of proofs and payment on a claim of this character, or by anything short of the issue of patent itself, is wholly incorrect. It is uniformly held that wherever the Department is vested with authority to receive, consider and pass upon the claims of applicants to a tract of public land, it is deemed to have jurisdiction thereof; and this is only another way of saying that the Department has jurisdiction over all land constituting a part of the public domain which has not been reserved, withdrawn or previously granted by authority of Congress. And when the jurisdiction of the Department has once attached, it continues until patent has issued. The issuance of patent, or the certification which is the equivalent of patent, is the act which terminates the jurisdiction of the Department. Therefore, in any case where the Department passes upon the conflicting claims of applicants for a tract of public land, and awards patent to one of them, its action, however erroneous, wrongful or mistaken; however arbitrary or con-

trary to law; is nevertheless a judgment within its jurisdiction, which is impervious to collateral attack and which can be challenged only by direct proceeding in equity.

Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 592.

United States v. Schurz, 102 U. S. 378, 402.

Orchard v. Alexander, 157 U. S. 372, 383.

Brown v. Hitchcock, 173 U. S. 473, 477.

Hawley v. Diller, 178 U. S. 476, 488.

King v. McAndrews, (C. C. A. 8th Cir.) 111 Fed. 860, and cases cited.

II.

THE RAILWAY COMPANY'S SELECTION, HAVING BEEN ACCEPTED AND ALLOWED BY THE LOCAL LAND OFFICERS, SEGREGATED THE LAND AGAINST COMPLAINANT'S APPLICATION TO ENTER THE SAME, SO THAT NO RIGHTS ATTACHED UNDER THAT APPLICATION, REGARDLESS OF THE VALIDITY OR INVALIDITY OF THE PRIOR SELECTION.

If the Circuit Court of Appeals was right in holding that complainant is not in position to attack the patent title under which defendants claim, because of his failure to perform the acts necessary to put him in privity with the United States, then his appeal was properly dismissed, even under the theory that the officers of the Land Department erred in rejecting his application to enter the land in controversy. But suppose we pass over that all-sufficient ground of defense and concede that complainant would be entitled to a decree if it could be held that the rejection of his application was an error of law. Under such a concession the case resolves itself into this question: Was the land in suit open to entry and acquisition under the timber and stone act at the time complainant offered his application to purchase the same, and was it then the duty of the officers of the Land Department to accept such application and permit entry and purchase thereunder, notwithstanding the prior selection by the Railway Company?

The Court of Appeals answered that question in the affirmative in the Hoyt case, on the supposed

authority of Sjoli v. Dreschel, 199 U. S. 564. But there is a rule of law not considered in the Hoyt case nor touched upon in Sjoli v. Dreschel which compels a contrary conclusion in the present case. That is the rule, firmly established by the decisions of this court as well as by numerous decisions of the Land Department and of other Federal and state courts, that an entry or selection of public land, accepted or recognized by the local land officers, segregates the land, and so long as it remains uncancelled of record, precludes the initiation of any other claim thereto; whether such entry or selection is regular or irregular, valid or void.

In this case the Railway Company made and filed its application to select the land, and paid the required fees, in exact accordance with the departmental practice and regulations in force at the time, and the same was accepted, approved and allowed by the local officers. This selection stood upon the records, intact and uncancelled, at the time complainant presented his application to purchase the land under the timber and stone act. Therefore, it constituted a complete barrier against complainant's attempt to acquire the land, and his application was rightly rejected by the land officers, even if every objection which complainant now makes against the validity of the Railway Company's selection were conceded to be well-founded in law. Nor could any right, priority or other advantage accrue to him by virtue of that application in case the Railway Company's selection was afterwards cancelled—an application submitted under such

conditions is a mere nullity, and nothing can be built upon it.

The latest declaration by this court of the rule here invoked is found in McMichael v. Murphy, 197 U. S. 304, and Holt v. Murphy, 207 U. S. 407, both of which cases involved the same land. The facts in those cases were these: On April 23, 1889, one White was permitted to make homestead entry of the land. Subsequently, two other parties attempted to enter the land, and on July 16, 1889, in a contest before the local land officers, it was held that all three claimants were disqualified because of their violation of the proclamation opening the tract to settlement, and that White's entry should be cancelled. An appeal was taken to the Commissioner of the General Land Office, who, on March 7, 1890, affirmed the ruling of the local officers and held White's entry for cancellation. White appealed to the Secretary of the Interior, who, on July 21, 1891, affirmed the decision of the Commissioner. McMichael settled on the land on June 3, 1889; and on July 21, 1889, he made application to enter it under the homestead law, but his application was rejected for conflict with White's entry. This was after the decision of the local officers holding White's entry for cancellation, but prior to the decision of the Commissioner on appeal. Again on August 31, 1889, McMichael made application to enter the land, and this second application was received, but "suspended" to await the result of the contest between White and the other claimants. On March 11, 1890, after the de-

cision of the Commissioner cancelling White's entry, and before the appeal to the Secretary from that decision was taken, although within the time allowed by law for such appeal, Holt filed a soldier's declaratory statement for the land, which was "suspended" by the Register and Receiver pending final action on White's appeal. Afterwards, on November 29, 1890, while the appeal was pending and before decision thereon, White filed a relinquishment of his entry, and Murphy immediately made a homestead entry on the land. After considerable litigation before the Department, Murphy was awarded the patent. McMichael brought suit in equity to have Murphy adjudged trustee of the patent title for his benefit; but a decision in favor of Murphy was affirmed by this court in McMichael v. Murphy, supra, and a similar suit brought by Holt was disposed of in Murphy's favor in Holt v. Murphy, supra.

It will be observed that White's entry was cancelled for an infirmity existing at the time the entry was made, viz: disqualification on White's part to make the entry, and that it had been held for cancellation by the local officers before McMichael's application was filed, and by the Commissioner before Holt tendered his declaratory statement. Moreover, Holt's statement was not rejected by the local officers, but was "suspended pending final action on the appeal"; so that if the filing of an application under such conditions could give any right or priority to the applicant, Holt's claim would have been protected as against the subse-

quent entry by Murphy. The same thing is true of McMichael's second application. Nevertheless, it was held that neither McMichael nor Holt acquired any rights under their applications.

In the opinion in the McMichael case, Mr. Justice Harlan says (page 311):

> "While the entry remained uncancelled of record, by any direct action of the land office or by relinquishment, could another person, by making an entry, acquire a right in the land upon which a patent could be based? If not, then McMichael acquired no right by his entry or application to enter. * * * McMichael's entry having been made at a time when White's entry remained uncancelled, or not relinquished, of record, conferred no right upon him for the reason that White's entry, so long as it remained undisturbed of record, had the effect to segregate the lands from the public domain and make them not subject to entry. On White's relinquishment, they again became public lands subject to the entry made by Murphy. In addition it may be observed that the action of the Land Department under the statutes relating to the public lands has been in line with the above views. This appears from the decision in Hodges v. Colcord, and from the opinion of the Secretary of the Interior in McMichael v. Murphy, 20 L. D. 147. It is our duty not to overrule the construction of a statute upon which the Land Department has uniformly proceeded in its administration of the public lands, except for cogent reasons."

In the opinion in the Holt case, Mr. Justice Brewer says (page 412):

> "The Supreme Court, however, rested its decision largely upon this rule of law: That whenever an entry has been made of a tract of land, that tract is segregated from the mass

of public land subject to entry until the existing entry is disposed of. Counsel for appellant do not question the general rule as to the effect of an entry regular upon its face, and concede that it is no longer open to doubt in view of the many rulings of the Land Department and the decisions of this Court. Hodges v. Colcord, 193 U. S. 192, McMichael v. Murphy, 197 U. S. 304, the latter involving the land in controversy. But they seek to distinguish this case in that the local land officers had held all the claimants disqualified, and that on appeal the Commissioner of the General Land Office, on March 7, 1890, had affirmed their ruling * * * and held the entry of White for cancellation; that the application of Holt to enter was made on March 11, 1890, before any appeal had been in fact taken from the decision of the Commissioner to the Secretary of the Interior—in other words, at the time that Holt applied to make his entry there was no pending entry. It could not have been foretold whether White would appeal from the decision of the Commissioner of the General Land Office, and if he did not there would be no entry to conflict with Holt's application. They contend that the application of Holt should have been recognized as an application to enter the land to take effect if White should not appeal from the decision of the Commissioner, or if on appeal that decision should be sustained. In that way Holt would have been given priority over all subsequent entries."

The learned Justice then considers, discusses and quotes from a number of the Land Department decisions, concluding with the following quotation from Stewart v. Peterson, 28 L. D. 515:

> "That this important matter of regulation may be perfectly clear, it is directed that no application will be received nor any rights recognzed as initiated by the tender of an appli-

> cation for a tract embraced in an entry of record, *until said entry has been cancelled upon the records of the local office.*"

And he says further:

> "Hence, by this rule, which was in force at the time the patent was issued, the appellant took no rights, preferential or otherwise, by the declaratory statement filed in March, 1890. Such a rule, when established in the Land Department, will not be overthrown or ignored by the courts, unless they are clearly convinced that it is wrong. So far from this being true of this rule, we are of opinion that to enforce it will tend to prevent confusion and conflict of claims."

Hodges v. Colcord, 193 U. S. 192, cited by this court in the McMichael and Holt cases as authority for those decisions, was another Oklahoma case of the same general character as the McMichael and Holt cases, where the same conclusion was reached; although that case did not present some of the special circumstances of the later cases. Other decisions illustrating and applying different phases of the same general principle are:

Hastings & Dakota Railroad Co. v. Whitney, 132 U. S. 357.

Sturr v. Beck, 133 U. S. 541, 548.

Whitney v. Taylor, 158 U. S. 85, 93.

Kansas Pacific Railroad Co. v. Dunmeyer, 113 U. S. 629, 644.

Witherspoon v. Duncan, 4 Wall. 210, 218.

Neff v. United States, (C. C. A. 8th Cir.) 165 Fed. 273, 281.

James v. Germania Iron Co., (C. C. A. 8th Cir.) 107 Fed. 597.

In the three Oklahoma cases the invalidity of the entry consisted of the disqualification of the entryman, and did not appear on the face of the record of such entry; and some emphasis is put, in the opinions, on the fact that the entry was "prima facie valid." But in Hodges v. Colcord the court refers with express approval to the language of Mr. Justice Lamar in Hastings & Dakota Railroad Co. v. Whitney, 132 U. S. 357, where he said:

> "Under the homestead law three things are needed to be done in order to constitute an entry on public land: First, the applicant must make an affidavit setting forth the facts which entitle him to make such an entry; second, he must make a formal application; and, third, he must make payment of the money required. When these three requisites are complied with, and the certificate of entry is executed and delivered to him, the entry is made—the land is entered. If either one of these integral parts of an entry is defective, that is, if the affidavit be insufficient in its showing, or if the application itself is informal, or if the payment is not made in actual cash, the register and receiver are justified in rejecting the application. But if, notwithstanding these defects, the application is allowed by the land officers, and a certificate of entry is delivered to the applicant, and the entry is made of record, such entry may be afterwards cancelled on account of these defects by the Commissioner or on appeal by the Secretary of the Interior. * * * *But these defects, whether they be of form or substance, by no means render the entry absolutely a nullity. So long as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain.*"

This language also received explicit approval in Sturr v. Beck, 133 U. S. 541, 549.

Now defects of the character defined in the foregoing quotation are such as appear upon the face of the record of the entry, and in such cases the validity or invalidity of the entry may be determined without reference to matters dehors the record. Nevertheless, in those cases, as well as in cases where the infirmity in the entry depends upon parol testimony and does not appear upon the record itself, it is held that where the entry has been accepted and allowed by the local land officers it effects a segregation of the land, and precludes the inception of any other rights thereto so long as such entry remains uncancelled.

Most of the cases cited above deal with homestead or preemption entries. But the rule is precisely the same in the case of a railroad indemnity selection or a selection under any of the lieu selection acts. This is well settled by the rules and decisions of the Land Department.

In the case of Southern Pacific Railroad Co., 32 L. D. 51, 53, the Secretary said:

> "A railroad indemnity selection, presented in accordance with departmental regulations and accepted or recognized by the local officers, *has been uniformly recognized by the Land Department as having the same segregative effect as a homestead or other entry made under the general land laws.*"

The foregoing language is quoted with approval in Santa Fe Pacific Railroad Co., 33 L. D. 161, 162, where the Secretary says further:

> "A pending selection list is therefore given *the same force in segregation of the land as an actual entry*, and lands so conditioned are within the rule fixed by circular of July 14, 1899, 29 L. D. 29."

The circular last above referred to contains the language which, in Holt v. Murphy, supra, Mr. Justice Brewer quoted approvingly from Stewart v. Peterson, 28 L. D. 515, viz:

> "In accordance with departmental instruction in the case of Stewart v. Peterson, 28 L. D. 515, it is hereby directed that no application will be received or any rights recognized as initiated by the tender of an application for a tract embraced in an entry of record, until said entry has been cancelled upon the records of the local office."

In Santa Fe Pacific Railroad Co. v. Northern Pacific Railway Co., 37 L. D. 593, 596, the question was whether certain unapproved indemnity selections by the Northern Pacific Company segregated the land as against certain lieu selections proffered by the Santa Fe Pacific Company, and the Secretary said:

> "This contention may be disposed of by reference to the instructions contained in the circular of July 14, 1899, 29 L. D. 29, which are to the effect that no application will be received or any rights recognized as initiated by the tender of an application for a tract embraced in an entry of record until such entry has been cancelled upon the records of the local land office. The term 'entry' as used in this circular has been construed uniformly to include any claim under the public land laws, which operates to segregate the land applied for from the public domain. The rule was promulgated in the interest of good administra-

tion, and it has been uniformly followed since its promulgation. Inasmuch as the record shows that the selections of the Northern Pacific Railway Company had not been cancelled at the time of the applications submitted by the Santa Fe Pacific Railway Company, it follows that the latter's selections were properly rejected."

In Eaton v. Northern Pacific Railway Co., 33 L. D. 426, it was said:

"What was the status of Eaton's claim to this land on January 1, 1898? He had not at that time initiated a claim by settlement, entry, or purchase. He had, as before shown, on October 26, 1895, applied to purchase the land under the timber and stone act, which application had been rejected for conflict with the pending indemnity selection by the railroad company. * * * *So long as the railroad indemnity selection remained intact, the land embraced therein was not subject to entry or purchase under the timber and stone act, and no right or claim could be initiated by an application for such entry or purchase.* * * * It is true that during the pendency of his appeal the railroad selection was canceled under a decision of this Department since held by the Supreme Court to have been erroneous, but this cancellation was not in any way attributable to his appeal, and it has been repeatedly held that an appeal from the action of the local officers properly rejecting an application because the land described therein is not at the time subject to entry, confers no right upon the applicant, even though the land becomes subject to entry during the pendency of the appeal."

See also:

Porter v. Landrum, 31 L. D. 352, 353.

Santa Fe Pacific Railroad Co. v. State of California, 34 L. D. 12.

George Hoge, 9 L. D. 332.
Thomas v. Spence, 12 L. D. 639.
Gallup v. Welch, 25 L. D. 3.

Aside from the authority of these decisions, which are in themselves controlling, there can be no logical distinction between an entry under the preemption or homestead law and a selection duly accepted and approved by the local officers. The term "entry" has been frequently defined, and in various terms, but it has never been held to comprehend anything more than a proper application, accompanied by affidavit when required, payment of the prescribed fees, and allowance by the local officers. It does not involve settlement upon the land itself, nor any recognition by the government beyond the action of the local officers. And a railroad indemnity selection, before approval by the Secretary, has every characteristic of an entry thus defined. It comprehends an application to select the lands, verified by affidavit and submitted according to the regulations of the Department, payment of the prescribed fees, and acceptance and allowance by the local officers. These elements are all present in the case at bar.

Hastings & Dakota Railroad Co. v. Whitney, supra.

Chotard v. Pope, 12 Wheat. 586.

Lockwitz v. Larson, 16 Utah, 275, 52 Pac. 279.

We have said that the settled rule of the Department to this effect should be taken as controlling. This is so under the familiar doctrine that the con-

struction given by the Department to a statute which it is charged with the duty of executing, and its rulings upon questions of practice and procedure in matters under its supervision, are entitled to great respect, and ought not to be disturbed except for the most cogent reasons.

Holt v. Murphy, supra.

McMichael v. Murphy, supra.

Hastings, etc., Railroad Co. v. Whitney, supra.

United States v. Moore, 95 U. S. 760.

United States v. Burlington, etc., Railroad Co., 98 U. S. 334, 341.

Heath v. Wallace, 138 U. S. 573, 582.

United States v. Alabama, etc., Railroad Co., 142 U. S. 615, 621.

Orchard v. Alexander, 157 U. S. 383.

Hewitt v. Schultz, 180 U. S. 139, 156, 163.

Louisiana v. Garfield, 211 U. S. 70.

Again, the rule that an ordinary entry effects a segregation of the land is entirely built up upon departmental regulations and decisions—it is not based upon statute, nor, in the first instance, upon decisions of the courts. So, too, the rule that a railroad indemnity selection, allowed by the local officers, has the same segregative effect as a homestead entry, is likewise an outgrowth of departmental rules and decisions. Both rules have the same source, depend upon the same principles, and have the same practical justification. One finds as much support in reason, practical justice, and convenience of administration, as the other. Both give the same effect to substantially similar acts.

If one can be sustained, as the rule with respect to an entry has been sustained by this court, it is not possible to draw a distinction against the rule which gives like effect to a selection.

But complainant may argue that by the action of the Commissioner of the General Land Office in 1897, based upon the erroneous ruling of the Secretary that Duluth was the eastern terminus of the Northern Pacific Railroad, the Railway Company's selection was, in effect, cancelled; and hence that the segregative effect of the prior selection was destroyed or suspended during the time which intervened between such action and reinstatement of the selection; and consequently at the time when complainant "renewed" his application in December, 1897.

In order to simplify the question, we may concede that this action of the Commissioner amounted to a cancellation of the selection, and that thenceforth, until reinstatement, the selection had no segregative effect; so that if complainant's original application had been filed during that period, the defense that the land was segregated as against such an entry, regardless of the validity of the selection, would not be available to defendants.

The record leaves some uncertainty as to the precise time when this cancellation was effected, but it seems quite plain that it was done pursuant to the Commissioner's order of July 17, 1897, and that it was therefore subsequent to that date.

(Record, pp. 15-16) However, it could not have been earlier than January, 1897, in any possible view; and it is quite immaterial whether the cancellation was made in January or July of that year.

Complainants original application was filed October 26, 1895. The allegations of his bill with respect to the presentation of this application are quite full, and most of them are admitted in the answer or are established by proof. But the allegations of the bill with respect to his action in December, 1897, are very meager, and none of such allegations are admitted in the answer, nor is there a scintilla of evidence to support them. The bill alleges that on December 28, 1897, complainant "did again renew his application to purchase said land, and again the local officers refused to allow" the application, but "received and filed" the same and "forwarded the same to the Commissioner of the General Land Office." A copy of the paper is annexed to the bill, and there are some allegations as to its *contents.* (Record, pp. 4-5, 28-30.)

The bill contains no allegation, in substance or effect, that in December, 1897, complainant possessed the requisite qualifications, or that he paid or offered to pay the fees required by law to be paid upon such an application. As stated, there is no proof whatsoever upon the subject of this "renewal" of the application; and as the answer contains no admission on the subject, it was incumbent upon complainant to make proper proof. Moreover, complainant did not appeal from the action

of the local officers on this December application, and no notice was taken of it in any of the subsequent proceedings in the General Land Office or before the Secretary.

In short, it is perfectly plain that complainant abandoned this 1897 application, and elected to rely upon his original application of October, 1895. Complainant has evidently sought to maintain the integrity of his original application and to rest his case on that, taking what advantage he could from the allegation that this application was "renewed" in December, 1897. But an examination of his pleading and the attached exhibits (Record, pp. 4-5, 28-30) makes it apparent that the proceeding in December, 1897, was either a new application, or it was nothing at all; and that if complainant ever acquired any rights thereunder they have long since been abandoned and lost. Complainant having elected to stand on the first application; having acquiesced, without appeal, in the rejection of the 1897 application by the local officers; and having abandoned the later proceeding so far as his proofs in this case are concerned; cannot now claim any advantage thereunder, even if the allegations of his bill were such as to present the matter fairly.

This question as to the segregative effect of the Railway Company's selection was not involved in Sjoli v. Dreschel, 199 U. S. 564, at all; and hence that case is not authority in the present case in any possible view.

In that case Sjoli, the homestead claimant, settled on the land in 1884, and resided thereon continuously until patent was issued to him in 1901. The Railway Company made no attempt to select the land until 1885, a year or more after Sjoli's settlement. The Department at first rejected Sjoli's application, but subsequently decided in his favor, cancelled and disallowed the Railway Company's selection, and awarded the land to Sjoli, and patent was accordingly issued to him. Therefore, at the time Sjoli initiated his settlement the land was a part of the unappropriated public domain, open to his entry, and at the time his entry was finally allowed by the Department the Railway Company's selection was cancelled of record. Whatever view may be taken of the decision in Sjoli v. Dreschel as applied to a situation like that which exists in the Hoyt case, where an entry under the timber and stone act was allowed and approved and payment accepted, although conditionally, at a time when the Railway Company's selection stood cancelled upon the records of the land office under a decision of the Department afterwards held by this court to be erroneous, it can have no bearing on the present case, where complainant's application to enter the land was made while the prior selection by the Railway Company stood of record, uncancelled and intact.

III.

WHEN THE RAILWAY COMPANY'S SELECTION WAS FINALLY APPROVED BY THE SECRETARY OF THE INTERIOR, AND PATENT ISSUED TO IT FOR THE LAND, THE APPROVAL AND PATENT RELATED BACK TO THE DATE OF THE ORIGINAL SELECTION, AND CUT OFF ALL INTERVENING CLAIMS.

This proposition is the principal issue in the Hoyt case, and is very thoroughly discussed in Mr. Bunn's brief. We do not propose to go over the whole question, but only to present our views on a few of the phases which it takes. And we shall deal with it as a proposition independent of the rule that a selection allowed by the local officers segregates the land against other entries, whether the selection be valid or not—assuming, for the purposes of this branch of the discussion, that in order to defeat the complainant's claim it must appear that the selection was in all respects regular and valid, and entitled the Railway Company to the land selected, and that such selection was followed by approval and patent.

We submit that there would be no room for argument upon this proposition if it were not for certain language found in the opinion of this court in Sjoli v. Dreschel, 199 U. S. 564. And it is not what is *decided* in that case, but what is *said* in the opinion, that is responsible for the doubt which has arisen. In this connection it seems to us that the language of Mr. Justice Harlan (who delivered the opinion in Sjoli v. Dreschel) in the recent case of

Kuhn v. Fairmont Coal Co., 215 U. S. 349, is especially pertinent. The learned Justice said:

> "It has been suggested—and the suggestion cannot be passed without notice—that the views we have expressed herein are not in harmony with some recent utterances of this court, and we are referred to East Central Eureka Min. Co. v. Central Eureka Min. Co., 204 U. S. 266, 272. That case involved, among other questions, the meaning of a deed for mining property. This court, in its opinion, referred to a decision of the state court as to the real object of the deed, and expressed its concurrence with the views of that court. That was quite sufficient to dispose of the case. But in the opinion it was further said: 'The construction and effect of a conveyance between private parties is a matter as to which we follow the court of the state'—Citing Brine v. Hartford F. Ins. Co., 96 U. S. 627, 636; De Vaughn v. Hutchinson, 165 U. S. 566. *Even if the broad language just quoted seems to give some support to the contention of the defendant, it is to be observed that no reference is made in the opinion to the numerous cases,* some of which are above cited, holding that the Federal court is not bound, in cases between citizens of different states, to follow the state decision, if it was rendered after the date of the transaction out of which the rights of the parties arose. *Certainly there was no purpose on the part of the court to overrule or to modify the doctrine of those cases; and the broad language quoted from East Central Eureka Min. Co. v. Central Eureka Min. Co. must therefore be interpreted in the light of the particular cases cited to support the view which that language imports.*"

Let us apply to the interpretation of the opinion in Sjoli v. Dreschel the principles invoked by the court in the foregoing quotation. We may concede

that the "broad language" of that opinion supports the contention of complainant in this case, and the decision of the Court of Appeals in the Hoyt case, to the effect that the Railway Company's selection, although regular and valid in and of itself, did not bar an entry of the land under the timber and stone act, where application for such entry was made prior to approval of the selection by the Secretary of the Interior. But we submit that under the principles applied in Kuhn v. Fairmont Coal Co. this broad language must be interpreted "in the light of the particular cases cited to support" the decision in Sjoli v. Dreschel, and in the light of the fact that no reference is made in that opinion to the numerous cases holding a contrary doctrine.

Now the case before the court in Sjoli v. Dreschel was that of a homestead claimant who had settled on the land in 1884, prior to any selection or attempted selection thereof by the Railway Company, and who continued to reside thereon, complying with all the requirements of the homestead law, at all times after the date of such settlement. The Railway Company filed its selection list in 1885. After prolonged litigation in the Department the railroad selection was disapproved by the Secretary and patent was issued to Sjoli, the homestead claimant. But the land was included in a withdrawal made by the Secretary some time previous to Sjoli's settlement thereon, in aid of the Railway Company's indemnity rights; and one of the questions in the case was whether that withdrawal, made in advance of selection, prevented the attaching of rights under Sjoli's settlement.

The particular cases cited in Sjoli v. Dreschel fully sustain the point actually decided; but we respectfully submit that not one of them furnishes support for the broad language of the opinion; at least in the application given that language by the Court of Appeals in the Hoyt case.

Hewitt v. Schultz, 180 U. S. 139, Menotti v. Dillon, 167 U. S. 703, Cedar Rapids & Missouri River Railway Co. v. Herring, 110 U. S. 27, Northern Pacific v. Miller, 7 L. D. 100 and Northern Pacific v. Davis, 19 L. D. 87, were all cases involving railroad indemnity selections, where the settlement antedated the selection.

Nelson v. Northern Pacific, 188 U. S. 108, Spicer v. Northern Pacific, 10 L. D. 440, Northern Pacific v. McCrimmon, 12 L. D. 554, and Northern Pacific v. Plumb, 16 L. D. 80, were cases involving land within the place limits of the Northern Pacific grant where settlement was made before definite location of the railroad, and the question was as to the effect of a withdrawal before settlement.

Northern Pacific v. Sanders, 166 U. S. 620, involved mineral selections made before definite location of the railroad and before any attempt to select.

United States v. Northern Pacific, 152 U. S. 284, United States v. Oregon & California Railroad, 176 U. S. 28, St. Paul & Pacific v. Northern Pacific, 139 U. S. 1, St. Paul & Sioux City Railroad v. Winona & St. Peter Railroad, 112 U. S. 720, Kansas Pacific v. Atchison, Topeka & Santa Fe, 112 U. S. 414, and Missouri, Kansas & Texas Railway Co. v. Kansas

Pacific Railway Co., 97 U. S. 491, are cases involving conflicting railroad grants, in none of which were the rights of individual entrymen considered; and none of these latter cases has any direct bearing upon the particular point now under discussion.

In Grinnell v. Railroad Co., 103 U. S. 739, the decision was in favor of the railroad company, but the court suggests the query whether the claim of the railroad company to selected lands would be superior to an entry made prior to selection.

Wilcox v. Eastern Oregon Land Co., 176 U. S. 51, is another case where the decision was in favor of the railroad company, and there is nothing suggesting a doubt as to the priority of an indemnity selection made previous to adverse entry.

Resser v. Carney, 52 Minn. 397, is a case which applies the well settled principle that no title vests under an indemnity selection until approval by the Secretary, and no question of priority is involved.

Musser v. McRae, 38 Minn. 409, is an earlier decision in the case reported under the same title at 44 Minn. 343. The plaintiffs, holding under conveyance from the company, sued to recover for timber cut from land within the indemnity limits of a Wisconsin railroad grant; but on the first trial they made no effort to prove that the land had been selected, or the selection approved, nor did they show any patent from the United States. The court held that the plaintiffs had failed to prove title sufficient to support an action for trespass; and the language quoted from that case in Sjoli v. Dreschel was used with reference to that omission. All this is explain-

ed in the opinion on the second appeal (Musser v. McRae, 44 Minn. 343) which is one of the authorities relied upon in support of our position. On the second trial the missing proof was supplied; and, the date of selection being established, the court held that the patent related back to the date of the filing of the selection list, so as to permit recovery for timber cut from land between the date of selection and the date of the Secretary's approval thereof.

Aside from the fact that none of the authorities cited in Sjoli v. Dreschel support the broad language of the opinion in the application given it by the Court of Appeals in the Hoyt case, we venture the statement, which we put in italics for greater emphasis, that:

Prior to the decision in Sjoli v. Dreschel it was never held or declared by any court or in any decision of the Land Department that the rights acquired under a railroad indemnity selection, properly made, of land then subject to such selection, where that selection was subsequently approved by the Secretary of the Interior in due course, could be defeated by an entry, settlement or other claim initiated after the date of such selection, although before approval thereof.

Nor has it been so held in any case since the decision of Sjoli v. Dreschel, except by the Court of Appeals in the Hoyt case, and by the Supreme Court of Minnesota in Northern Pacific v. Wass, 104 Minn. 411, and in Houston v. Northern Pacific, (Minn.) 123 N. W. 922,—cases decided by courts

which considered themselves bound by the language of the Sjoli case. In some other cases in this and other courts the language of Sjoli v. Dreschel has been cited or quoted, but in none of these latter cases has it been applied in the sense it is here considered. For instance, Brandon v. Ard, 211 U. S. 11, is an echo of the old case of Ard v. Brandon, 156 U. S. 537, where settlement on the land antedated the inception of the railroad company's rights; and Osborn v. Froyseth, decided by this court March 14, 1910, was a case where, as in Sjoli v. Dreschel, a homestead claimant settled on the land long prior to the first valid selection by the railway company, although in that case there had been an earlier selection adjudged invalid and cancelled by the Land Department, upon which it was held no rights could be predicated.

Indeed, if the decision in Osborn v. Froyseth is carefully considered it will be found at least inferential authority for our position. If it were the law that the rights of a claimant settling on the land at any time before approval by the Secretary are superior to rights under an indemnity selection, there would have been no occasion for the discussion and consideration given that case, nor for the marked emphasis put upon the fact that the homestead claimant settled on the land prior to any valid selection thereof. For in that opinion Mr. Justice Lurton said:

> "The plain effect of the settlement made upon the land here in controversy before any valid selection of the same land by the railroad company, under its grant, was to initiate

a homestead right. That settlement and possession continued from the time it was first made, and when, in October, 1891, the Hastings and Dakota Railroad, or its successors in title, attempted to select that land as indemnity land, the land in question was in the actual occupancy of Froyseth claiming it as a homestead. It had, by such settlement, been segregated from the lands subject to selection, and in a contest between such a homesteader and those claiming under selections subsequently made of lieu lands the claim of the former is the better claim. * * * But it is urged that the original selection made May 26, 1883, was valid, and operated to vest the title as of that date in the railroad company. * * * The rejection by the Secretary of the Interior of the selection made in 1883 is fatal to any claim now made to carry back the title of the plaintiff in error to that selection. * * * Thus, if either preemption or homestead rights had been initiated before such selection, the parcels to which such right had attached were not subject to appropriation as indemnity lands. * * * But it is urged that the mere fact that there was no record evidence of the homestead claim when the selections of 1891 were made was enough to give efficacy to that selection and vest the legal title under the patents thereafter issued. But this is answered by what we have already said, namely, that if at that date this land was actually occupied by one qualified under the law, who had entered and settled thereon before that time, with the intent to claim it as a homestead, the land had ceased to be public land and as such subject to selection as lieu land."

This case of Osborn v. Froyseth also supplies a sufficient answer to the suggestion that the rule deduced from the broad language of the opinion in Sjoli v. Dreschel was necessary to the decision in

that case, for the reason that Sjoli did not file his application to enter the land as a homestead until long subsequent to the selection thereof by the Railway Company, although his settlement thereon preceded such selection. The same conditions existed in Osborn v. Froyseth; and the court points out that "under the act of May 14, 1880, (ch. 89, 21 Stat. 141, sec. 3) the right of one settling in good faith for the purpose of claiming a homestead relates back to the date of settlement"; also that where the land is, at the time of selection, in the occupancy of an actual settler who intends in good faith to claim the land as a homestead, such occupancy removes the land from the category of land subject to indemnity selection; and an attempted selection thereof is ineffectual, without regard to whether the settler subsequently perfects his homestead claim. These propositions are fully sustained by St. Paul, Minneapolis & Manitoba Railway Co. v. Donohue, 210 U. S. 21, 31, which is cited in that connection in Osborn v. Froyseth.

But let us examine some of the numerous cases, to which no reference is made in the opinion in Sjoli v. Dreschel, which announce and apply principles directly contrary to or inconsistent with the broad language of that opinion as interpreted by the Court of Appeals in the Hoyt case. There is no lack of authorities directly in point. The great cases of Campbell v. Doe, 13 How. 244, Shepley v. Cowan, 91 U. S. 330, and McCreery v. Haskell, 119 U. S. 327, are referred to in Mr. Bunn's brief, and we shall not dwell upon them here at any great length. But there are certain features of those cases which we shall touch upon in passing. Each of those cases declares and applies the familiar doctrine, thus stated by Mr. Justice Field in Shepley v. Cowan:

> "The party who takes the initiatory step in such cases, if followed up to patent, is deemed to have acquired the better right as against others to the premises. The patent which is afterwards issued relates back to the date of the initiatory act, and cuts off all intervening claimants. * * * In all such cases, the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right."

This principle was applied in McCreery v. Haskell to a selection which, in its essential qualities, was precisely like the selection in the case at bar. This was a state selection under a grant to the State of California by an act which provided (10 Stats. 247, Sec. 7):

> "That where any settlement * * * shall be made upon the 16th and 36th sections

> before the same shall be surveyed, or where such sections may be reserved for public uses, or taken by private claims, other lands shall be selected by the proper authorities of the state in lieu thereof, agreeably to the provisions of the act of Congress approved on the 20th of May, 1826, entitled 'An Act to appropriate lands for the support of schools in certain townships and fractional townships not before provided for,' *and which shall be subject to approval by the Secretary of the Interior* * * *."

In that case Mr. Justice Field, delivering the unanimous opinion of the court, said:

> "The land * * * was open to settlement with other public lands, and consequent preemption by settlers, and to selection by the State in lieu of the school sections within the confirmed Mexican grant. * * * As between the settler and the State, the party which first commenced the proceedings required to obtain the title, if followed up to the final act of the government for its transfer, is considered as being entitled to the property. *In such cases the rule prevails that the first in time is the first in right.* * * * Where, by reason of the loss of the school sections, a selection is made of other lands, the list certified *operates upon the selection as of the day when made and reported to the local land office, and cuts off, as would a patent in such cases, all subsequent claimants.* In the present case, the selection by the authorities of the State of the land in controversy, was made on the 22nd of April, 1868, nearly one year and eight months before the alleged settlement of the plaintiff. *The subsequent approval of the selection by the Secretary of the Interior* and the listing of the land to the State by the Commissioner of the General Land Office, completed the proceedings which *vested the title in the State as of the date of the selection.*"

The cases of Shepley v. Cowan and McCreery v. Haskell have been cited, and the principle that in proceedings for the acquisition of public lands the first in time is the first in right and that the patent when issued relates back to the initiatory step and cuts off all intervening claimants has been applied, in a vast number of decisions by state and Federal courts and by the Land Department. A few of these cases are cited below.

Sturr v. Beck, 133 U. S. 541, 550.

Hy-Yu-Tse Mil-Kin v. Smith, 194 U. S. 401, 414.

United States v. Anderson, 194 U. S. 394, 399.

United States v. Detroit Lumber Co., 200 U. S. 321.

Wirth v. Branson, 98 U. S. 118.

Last Chance Mining Co. v. Tyler Mining Co., (C. C. A. 9th Cir.) 61 Fed. 557.

Peyton v. Desmond, (C. C. A. 8th Cir.) 129 Fed. 1.

Waldron v. United States, 143 Fed. 413.

Ison v. Nelson Mining Co., 47 Fed. 199.

Lilienthal v. Southern California R'y. Co., 56 Fed. 701.

Howell v. Slauson, 83 Cal. 539, 23 Pac. 692.

Brigham City v. Rich, 34 Utah 130, 97 Pac. 220.

Talbot v. King, 6 Mont. 76, 9 Pac. 434.

Silver Bow Mining & Milling Co. v. Clarke, 5 Mont. 378, 5 Pac. 570.

Benton v. Johncox, 17 Wash. 277, 49 Pac. 495.

Lone Tree Ditch Co. v. Cyclone Ditch Co., 15 S. D. 522, 91 N. W. 352.

Danforth v. Morrical, 84 Ill. 456.

It seems to us that the case of United States v. Anderson, 194 U. S. 394, is absolutely conclusive of the question now under discussion. That was a case involving a grant to the State of Alabama in aid of railroads, which provided for indemnity selections to be made by the agents of the State, subject to the approval of the Secretary of the Interior. Selections were duly made in 1887, but were rejected by the local officers under an erroneous view of the law. On appeal this action of the local officers was set aside, and in 1896 the selections were approved by the Secretary and the lands certified to the State. During the period which elapsed between the date of selection and the date of the approval by the Secretary, certain persons went upon the land and removed valuable iron ore and lime rock therefrom. The United States brought suit to recover for this trespass, and a compromise was made with the trespassers under which they paid $15,000 to the United States in settlement of the claim for the material removed from the land. Afterwards the persons succeeding to the rights of the State under the selection sued the United States in the Court of Claims and recovered judgment for $15,000. This judgment was affirmed by this court in an opinion by Mr. Justice White, who said:

> "Under these circumstances, the case is one for the application of the fiction of relation, by which, in the interest of justice, *a legal title is held to relate back to the initiatory step for the acquisition of the land.* Many cases illustrating the doctrine in various aspects have been determined in this court. (Citing au-

thorities in foot-note.) Indeed, this case is one coming peculiarly within the principle of relation, as the approval of the selections manifestly imported that at the time of the application for selections the land in quesiion was rightfully claimed by the applicant. * * * Here, as we have seen, the grantee had exercised his right to apply for selections within the indemnity limits and had in legal form requested the approval of the same by the Government. Everything, therefore, which the grantee was required by law to do to obtain the legal title had been performed. These facts bring the case within the principle decided in Heath v. Ross, 12 Johns. 140, and Musser v. McRae, 44 Minn. 343."

Musser v. McRae, 44 Minn. 343, was a case where timber was cut from the selected land by trespassers between the date of a railroad indemnity selection and the date of approval thereof; and it was held that the patent title related back to the date of selection so as to carry the right to recover for the trespass. The court says:

"Upon the state of facts presented by the record the title acquired by the company under the patent unquestionably inured to the plaintiffs, its grantees, and their further contention is that the title derived from the government under the patent took effect by relation as of the date of the selection of the lands by the company. * * * The deficiency lands selected by the company were such as they were entitled to, and the patent is evidence of the ratification of the selection, and this selection duly certified to the department, may be treated as a lawful application for the confirmation or approval thereof. It was an assertion of their claim to the particular lands, *and, if approved, the title may properly be held to relate back at least to the date of such selec-*

tion in order to protect them against trespassers upon the lands."

Musser v. McRae was expressly approved in United States v. Anderson, supra, and was recognized as authority, although distinguished upon the particular facts of that case, in United States v. Loughrey, 172 U. S. 206; where this court said of the decision in Musser v. McRae:

> "It was held that the issuance of a patent to the Railway Company for the lands so selected was evidence that the company had complied with all the conditions of the grant, and was entitled to the lands described therein, and that the title passed from the United States *at the date of the selection.* And it was further held that * * * the patents must be held to relate back to the selection of the lands, so as to save the purchasers to whom the lands had been granted, a right of action for the timber wrongfully removed from the land."

Now it seems to us that the decisions in United States v. Anderson and Musser v. McRae are wholly inconsistent with the idea that no rights attach by virtue of a selection allowed by the local officers, as against a claim initiated after such selection, but before approval thereof by the Secretary of the Interior. If such approval, and the patent issued in consequence thereof, relate back to the date of selection so as to enable the selector to recover the value of timber taken from the land before such approval, and to recover from the Government itself money collected by it in settlement of a claim for similar trespasses, how can it be held that the approval and patent do not relate back to

the date of selection and cut off claims subsequently initiated? Surely there is the stronger reason for the application of the doctrine of relation in the latter case. Indeed, it is for the purpose of cutting off intervening claims that the doctrine is most commonly invoked.

In the leading case of Stark v. Starrs, 6 Wall. 402, Mr. Justice Field said:

> "When in fact the patent does issue, it relates back to the inception of the right of the patentee, *so far as it may be necessary to cut off intervening claimants.*"

In Smelting Co. v. Kemp, 104 U. S. 647, the same great judge said:

> "This doctrine as to the conclusiveness of a patent is not inconsistent with the right of the patentee, often recognized by this court, to show the date of the original proceeding for the acquisition of the title, where it is not stated in the instrument, as the patent is deemed to take effect by relation as of that date, *so far as it is necessary to cut off intervening adverse claims.*"

In Heydenfeldt v. Daney Gold Min. Co., 93 U. S. 634, it was said:

> "The patent subsequently obtained from the United States relates back to the time of the original location and entry, and perfects their right *to the exclusion of all adverse intervening claims.*"

Peyton v. Desmond (C. C. A. 8th Cir.) 129 Fed. 1, was a case similar to United States v. Anderson and Musser v. McRae, except that it was a homestead settler who was there permitted to re-

cover for timber cut from the land before his settlement claim had ripened into an equitable title; and in support of the decision of the court, Judge Van Devanter cites the following language from Shepley v. Cowan, supra:

> "The party who takes the initiatory step in such cases if followed up to patent is deemed to have acquired the better right, as against others, to the premises. The patent which is afterwards issued relates back to the date of the initiatory act *and cuts off all intervening claimants.*"

The following language from the Eureka Case, 4 Sawy. 317, is quoted with approval in Silver Bow Mining & Milling Co. v. Clark, 5 Mont. 378, 5 Pac. 570:

> "Each patent is evidence of a perfected right in the patentee to the claim conveyed, the initiatory step for the acquisition of which was the original location. * * * The patent will take effect by relation as of that date, *so far as may be necessary to cut off all intervening claimants.* * * * As, in the system established for the alienation of the public lands, the patent is the consummation of a series of acts having for their object the acquisition of the title, the general rule is to give to it an operation by relation at the date of the initiatory step, so far as may be necessary to protect the patentee against subsequent claimants to the same property."

And in this connection the language already quoted above from McCreery v. Haskell is especially pertinent.

In addition to the authorities already cited, the following cases further support the principle that the doctrine of relation will be applied for the purpose of cutting off claims attaching after the initial step in the proceedings which culminate in patent:

Irvine v. Sims, 3 Dall. 425.

Ross v. Barland, 1 Pet. 655.

Beard v. Federy, 3 Wall. 478.

Weeks v. Bridgeman, 159 U. S. 541.

Patterson v. Tatum, 3 Sawy. 164.

Pacific Coast Mining & Milling Co. v. Spargo, 16 Fed. 348.

Klein v. Argenbright, 26 Iowa, 493.

Cothrin v. Faber, 68 Cal. 39, 4 Pac. 940.

St. Onge v. Day, 11 Colo. 368, 18 Pac. 278.

Faull v. Cooke, 19 Ore. 455, 26 Pac. 662.

Lockwitz v. Larson, 16 Utah, 275, 52 Pac. 279.

Washington Rock Co. v. Young, 29 Utah, 108, 80 Pac. 382.

Sage v. Crowley, 83 Minn. 314.

The basic principle which from the beginning has controlled the disposition of the public lands is that, as between conflicting claimants, the first in time is first in right, and that the patent relates back to the date of the initial step lawfully taken by the patentee, or his predecessors in interest, looking towards the acquisition of the land under the law providing for disposal of the same. This principle has been expressly declared in hundreds of cases, but few of which are cited in this brief, and in a still greater number of decisions it has been tacitly recognized and has controlled the determination of the court, although not referred to in terms. And all those cases are but applications of a fundamental rule which runs through the whole fabric of the public land law, and which controls, in some degree, the determination of practically every case where two or more parties claim the same tract of land. There is no principle of law having relation to the disposal of the public lands and to land titles in general which is so well settled or which has had such widespread and long-continued application. And there is surely none whose reversal or modification would so complicate and disturb the administration of the public lands and the security of titles.

In the course of a somewhat extensive experience in public land questions, and after a most exhaustive search among the authorities bearing upon this particular question, we have not learned of a single case in which this principle has been denied, or which gives authority for the conclusion adopted

by the Court of Appeals in the Hoyt case—except as such intent may be imputed to the language of Sjoli v. Dreschel, and except for the recent decisions based upon the wording of that opinion.

That principle has been applied to entries and claims of every character, and as to no class of claims has it been denied or disregarded. And always the date that fixes priority is held to be the date of the initial step taken under the law, whether that first step be settlement on the land, the filing of a declaratory statement or application to enter or purchase, the deposit of a land warrant or other certificate, or the filing of a selection list or application to select. And it is always the act of settlement or the filing of the application or other paper in the local land office that fixes the right, regardless of the date when action is taken thereon by the local land officers, the Commissioner of the General Land Office, or the Secretary of the Interior. In no case that we have found has the attaching of the claimants rights, as a matter of priority over other claims, been postponed to the date when action was taken on his claim or selection by the officers of the Land Department, if the initial step was lawfully taken and the land was then subject to such appropriation.

We have selected for the information of the court a few of the numerous cases illustrating the application of this principle to different classes of claims; indicating, in each case, the character of the

entry and the date from which the claim was held to have priority.

Preemption entry: from date of settlement on land, where that act preceded the filing of the declaratory statement:

Johnson v. Towsley, 13 Wall. 72.

Shepley v. Cowan, 91 U. S. 330.

Lilienthal v. Southern California Ry. Co., 56 Fed. 701.

Lone Tree Ditch Co. v. Cyclone Ditch Co., 15 S. D. 522, 91 N. W. 352.

Preemption entry: from date of filing the declaratory statement, where that act preceded settlement:

St. Onge v. Day, 11 Colo. 368, 18 Pac. 278.

Homestead entry: from date of settlement, where that act preceded the filing of application to enter.

Ard v. Brandon, 156 U. S. 537.

Osborn v. Froyseth (decided by this court March 14, 1910).

Faull v. Cooke, 19 Ore. 455, 26 Pac. 662.

Homestead entry: from date of filing application to enter, where the act preceded settlement.

Sturr v. Beck, 133 U. S. 541.

Peyton v. Desmond, (C. C. A. 8th Cir.) 129 Fed. 1.

Timber and stone entry: from date of filing application.

St. Paul, M. & M. Ry. Co. v. Donohue, 210 U. S. 21.

State selection under quantity grant: from date of filing application to select in local land office.

Ison v. Nelson Mining Co., 47 Fed. 199.

Patterson v. Tatum, 3 Sawy. 164.

Brigham City v. Rich, 34 Utah 130, 97 Pac. 220.

State selection of indemnity lands: from date of filing application to select in local land office.

McCreery v. Haskell, 119 U. S. 327.

Howell v. Slauson, 83 Cal. 539, 23 Pac. 692.

Mining claim: from the date of location.

Heydenfeldt v. Daney Gold Min. Co., 93 U. S. 634.

Last Chance Min. Co. v. Tyler Min. Co. (C. C. A. 9th Cir.) 61 Fed. 557.

Talbot v. King, 6 Mont. 76, 9 Pac. 434.

Silver Bow Mining & Milling Co. v. Clarke, 5 Mont. 378, 5 Pac. 570.

Indian allotment: from date of application for allotment or date of settlement.

Waldron v. United States, 143 Fed. 413.

Hy-Yu-Tse-Mil-Kin v. Smith, 194 U. S. 401.

Spanish or Mexican grant: from date of filing application for confirmation.

Ross v. Barland, 1 Pet. 655.

Landes v. Brand, 10 How. 348.

Beard v. Federy, 3 Wall. 478.

Lynch v. Bernal, 9 Wall. 315.

Military bounty land warrants: from date of location by filing in local land office.

Wirth v. Branson, 98 U. S. 118.

Klein v. Argenbright, 26 Iowa 493.

Lieu selection under the exchange provisions of the so-called "Forest Reserve Lien Selection Act" of June 4, 1897: from date of filing application to select in local land office.

Clarke v. Northern Pacific, 30 L. D. 145.
Gideon F. McDonald, 30 L. D. 124.
Kern Oil Co. v. Clarke, 30 L. D. 550.

Lieu selection under the exchange provisions of the act of March 2, 1899, establishing the Mt. Rainier National Park: from date of filing application to select in local land office.

Ferguson v. Northern Pacific, 33 L. D. 634.
Swanson v. Northern Pacific, 37 L. D. 74.
State of Idaho v. Northern Pacific, 37 L. D. 70.

Lieu selection under act of July 1, 1898, for the adjustment of conflicting claims under the Northern Pacific grant: from date of filing application to select in local land office.

Northern Pacific v. Mann, 33 L. D. 621.

Soldier's additional homestead: from date of filing application to enter in local land office.

Oliver v. Thomas, 5 L. D. 289.

As between two railroad companies whose indemnity limits overlap "priority of selection secures priority of right," and the priority depends on the date of filing the selection list.

St. Paul & Sioux City Railroad v. Winona & St. Peter Railroad, 112 U. S. 720.

There is nothing whatever in such decisions as Wisconsin Central v. Price County, 133 U. S. 496, Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 301, Humbird v. Avery, 195 U. S. 480, and Oregon & Californina Railroad Co. v. United States, 189 U. S. 103 and 116, (and there are many cases of the same general character) which is in any respect inconsistent with the doctrine we invoke. In each of those cases it is held that approval by the Secretary of the Interior is necessary to convert a railroad indemnity selection into an estate or interest entitled to recognition *as against the United States*, or into an equitable title which can be used as a basis for proceedings in which *ownership* of the land is an essential prerequisite.

There is a clear distinction between acts necessary to establish an equitable title or vested interest in the land as against the Government, and acts necessary to secure priority over an adverse claimant under the public land laws. It is freely admitted that until approval of an indemnity selection the selector has no rights as against the United States; and that until such approval it is competent for the Government to deal with or dispose of the land as it sees fit. But this is a very different thing from saying that the act of selection, when followed up by approval, gives no rights or priority over an individual who attempts to initiate a claim to the land subsequent to such selection, but prior to the approval thereof.

Under practically every method by which public lands are acquired, and especially in the case of

entries under the preemption law, the homestead law, and the timber and stone act, there is an initial step—settlement on the land, or the filing in the local land office of a declaratory statement or application to enter—which fixes priorities as between the applicant and a possible adverse claimant, but which confers no vested right as against the Government. It is settled by numerous decisions that until the preemptioner or timber and stone applicant has completed his entry by final proof and payment, and until the homesteader has earned the land by full compliance with the requirements of the homestead law, the Government may dispose of the land as it sees fit, and the claimant has no standing to complain of any such disposition.

Frisbie v. Whitney, 9 Wall. 187.

The Yosemite Valley Case, 15 Wall. 77.

Consequently the fact that an indemnity selection does not, prior to approval, create a right or interest effective against the Government or vest in the company an estate which is subject to taxation or an equitable title which will support an action dependent upon ownership, has no bearing on the question whether such selection, if otherwise valid, has priority over a claim subsequently initiated under the homestead law or the timber and stone act. This distinction was recognized in Cosmos Exploration Co. v. Gray Eagle Oil Co., supra, where it was held that a lieu selection under the act of June 4, 1897, did not vest an equitable title

in the selector until approval of such selection by the Secretary. After so declaring, Justice Peckham said:

> "It may be that when the decision of the Land Department is made, if it be favorable to the applicant, the complete equitable title claimed will accrue *from the time the selection of the lands was made in the local land office*, and when the patent subsequently issues the legal title *will vest from the time of selection*."

And in the course of the opinion in Oregon & California Railroad Co. v. United States, supra, Mr. Justice Harlan said:

> "The rule is otherwise as to lands within indemnity limits. As to lands of the latter class the Company *acquires no interest* in any specific sections until a selection is made with the approval of the Land Department; *and then its right relates to the date of the selection*."

The Supreme Court of Missouri in Hammond v. Johnston, 93 Mo. 198, 6 S. W. 83, recognized this distinction as applied to selections under the New Madrid Act, saying:

> "It is true, beyond all doubt, that as between Easton and those claiming under him on the one hand, and the United States on the other, there was no vested right in Easton and those claiming under him, as against the United States, until the surveyor returned the plat to the recorder of land titles, which was not done until 1833. *But as between Easton and third persons, he did acquire a priority* and a right which the courts respect and uphold and enforce."

In some of the arguments in this case much emphasis has been laid upon the provision in the granting act to the effect that indemnity selections shall be made "subject to the approval of the Secretary of the Interior," or "under the direction of the Secretary of the Interior"; but these provisions do not affect the question of priority. They are very material in determining whether any right is secured by the Railway Company, *as against the United States*, by the mere filing of its list of selections. But as explained above, this is something entirely distinct and different from the question of priorities as between individual claimants. Until the selection has been passed upon and approved by the Secretary, it has no standing as against the Government; but when the selection has been examined and found to be legal and valid, and the required approval has been given, that approval relates back to and takes effect from the date of the filing of the selection list in the local office, as against claims asserted by an individual whose alleged rights have had their inception in the interim.

In passing upon such selections the Secretary acts in a judicial or quasi-judicial capacity. His discretion to approve or disapprove the selections is not arbitrary and unrestrained, but must be exercised in a reasonable and judicial manner. If the land is free from adverse claims and is such as the Company is entitled to select, if a deficiency exists for which the Company is entitled to indemnity, and if the selection and the proceedings connected therewith are in all respects regular and in accordance with the law and departmental regulations, then it is the duty of the Secretary to approve such selection.

In McHenry v. Nygard, 72 Minn. 2, Judge Mitchell said:

> "Although the selection of the lieu lands was to be made under the direction of the Secretary of the Interior, they were to be selected by the railroad company, and not by the Secretary. If the company was entitled to select the land, and did so in conformity with all the requirements of law, the officers of the Land Department had no authority arbitrarily to refuse to recognize and approve the selection. The rights of the Company under its selection became fixed and vested notwithstanding such rejection and refusal."

In Jones v. Northern Pacific, 34 L. D. 105, 110, the Secretary said:

> "That the right of selection conferred by these acts cannot be restricted by the Secretary of the Interior seems clear. His duty in the premises is to supervise the administration of the grant, but this authority does not permit him to abridge or enlarge the laws of Congress. He should see that the selections made in sat-

> isfaction of the grant are confined to the lands described in the granting act, but as between different sections equally within the description contained therein, he cannot say which may or which may not be selected, for in so doing he would be denying the railroad company the right to make the selection."

In Willamette Valley and Cascade Wagon Road Co. v. Bruner, 26 L. D. 356, it was said:

> "The right of selection conferred by the granting act cannot be restricted or limited by the Secretary of the Interior. It is his duty to supervise the administration of this grant but his authority does not permit him to revise or limit the laws of Congress. He is as much bound by the provisions of the granting act as is either of the claimants in this case. It is the duty of the Secretary to see that the selections made in satisfaction of the grant are confined to lands described in the granting act. * * * The supervisory authority of the Secretary is not unlimited and cannot be exercised arbitrarily for the purpose of conferring rights upon one person to the detriment of the acknowledged rights of others; Cornelius v. Kessel, 128 U. S. 456."

See also:

Sage v. Swenson, 65 Minn. 517.

Southern Pacific v. Wiggs, 43 Fed. 333.

St. Paul & Sioux City v. Winona & St. Peter, 112 U. S. 720.

Insofar as a distinction may be drawn between an act which provides that selections thereunder shall be "subject to the approval" of the Secretary, and one which provides that selections shall be made "under the direction" of the Secretary, the distinction is favorable to selections under a provi-

sion of the latter sort. It has been well said that a selection is made "under the direction" of the Secretary, when it is made pursuant to general regulations or instructions promulgated by him; whereas, where the statute expressly requires his "approval," an affirmative approval of the specific selections is necessary to vest title thereunder.

In Southern Pac. R. Co. v. Wiggs, 43 Fed. 333, Judge Sawyer said:

> "Although the selection of the lieu lands were to be 'made under the direction of the Secretary of the Interior,' they were to be 'selected by said company,' not by him; nor was the selection required to be approved by him as is required by some other acts. And when there was a deficiency, and the company selected lands open to selection, there was no authority vested in the Secretary to arbitrarily refuse to recognize and allow such selection. This would deprive the company of the right of selection expressly given by the statute, and vest it in the Secretary."

But the case at bar has been argued and is submitted on the theory that the same rules apply against the selection under which defendants derive title, that would apply if the act provided that selections thereunder should be made "subject to the approval" of the Secretary.

There is another point which is entitled to great weight in the consideration of this question. The Land Department has always held that no rights can be acquired by an entry made subsequent to a valid railroad indemnity selection, although prior to the approval of such selection. In the beginning it was supposed that a withdrawal of lands within the indemnity limits, in aid of the company's right of selection, prevented the attaching of adverse claims, even where settlement was made or application filed before actual selection of the lands by the company. Consequently in those days the question seldom arose where priority depended upon the date of selection rather than upon the date of withdrawal; since in most cases withdrawal preceded selection. But even then there was sometimes a case where there had been no effective withdrawal, but where the company had filed its selection list before the inception of the adverse claim; and in every such instance the selection was held to give priority. Since the rule was established that the withdrawal of indemnity lands prior to selection is unauthorized and ineffectual, the Department has consistently held, in numerous cases, that the date of actual selection (which is interpreted to mean the date the selection list is filed in the local office), regardless of the date of approval, determines the rights of the company as against adverse claimants; and has steadfastly refused to recognize claims initiated after that date, where the original selection is found to be regular and valid. We cite below a few of the many cases

illustrating the various phases of this rule:

Bright v. Northern Pacific, 6 L. D. 613.

Simser v. Southern Minnesota Ry. Co., 12 L. D. 386.

Florida Central v. Peninsular Railroad Co., 18 L. D. 333.

Gamble v. Northern Pacific, 2 L. D. 351.

Page v. Northern Pacific, 24 L. D. 444.

Northern Pacific v. Templeton, 27 L. D. 543.

Northern Pacific v. Wolfe, 28 L. D. 298.

Falje v. Moe, 28 L. D. 371.

Southern Pacific Railroad Co., 28 L. D. 281.

Oregon & California Railroad v. Johnston, 29 L. D. 442.

Northern Pacific v. Smith, 31 L. D. 151.

Southern Pacific Railroad Co., 32 L. D. 51.

Eaton v. Northern Pacific, 33 L. D. 426.

Santa Fe Pacific Railroad Co., 33 L. D. 161.

Jones v. Northern Pacific, 34 L. D. 105.

Ferguson v. Northern Pacific, 37 L. D. 260.

Norris v. Northern Pacific, 37 L. D. 426.

Under the familiar rule already referred to in this brief in another connection, where the authorities are cited, these decisions of the Land Department should be given great weight by the court and should not be overruled except for the most cogent reasons nor unless it is plain beyond doubt that they declare an erroneous rule of law.

Now we respectfully submit that the rule which forms the basis of the departmental decisions cited above is right, in principle and upon authority, and ought to be sustained independent of the weight to which those cases are entitled as decisions of the

department charged with the duty of executing the statutes thus construed. We submit that the rule is a rule of practical justice and is conducive to orderly administration; and that a contrary rule would create disturbance and disorder and would serve no good or useful purpose.

Such a rule is consistent with the principles which control the practice of the Department under all the various laws for the disposition of the public domain—it is a rule of necessity, without which an orderly administration would be impossible—and there is no fair reason for distinguishing a railroad indemnity selection from any form of acquisition of public land. Every method by which public land may be acquired under the law necessarily involves, first, the act by which the claimant indicates his desire to appropriate specific land, and next, a determination by the Department that he is entitled to take that particular land. Obviously the assertion of the claim must precede the determination by the Department, and in the ordinary course of administration considerable time must often elapse before the determination can be made. In no class of cases is delay so likely to occur as in the consideration of railroad indemnity selections, where the Department must determine not only whether the land selected is such as the company is entitled to receive, but also whether the loss for which indemnity is claimed furnishes proper ground for such selection; and rarely, if ever, is the delay chargeable to neglect or omission of the company.

It has uniformly been held, from the beginning, that a claimant who has fully complied with the law on his part cannot be prejudiced by delay in passing upon his claim, and that no claim subsequently initiated will be permitted to defeat his rights; but when his entry has been passed upon by the Department the patent issued to him relates back to the date of the first lawful assertion of his right and cuts off all intervening claims. Now what just reason can there be for applying a different rule in the case of railroad indemnity selections? If the company is entitled to the land under its granting act, if the land is free from other claims at the time of selection, and if the selection is properly made in accordance with the regulations and practice of the Department, why should the company suffer from delay of the Department in passing upon the selection, and why should the company be deprived of its rights in favor of a speculator who seeks to enter the land with full knowledge of the company's prior selection? We repeat that such a rule, in practical operation, will be subversive of good administration and will work injustice and disorder and create uncertainty, and that it will serve no good or useful purpose.

IV.

THE PATENT MUST BE TREATED AS A CONCLUSIVE ADJUDICATION OF ALL QUESTIONS OF FACT OR OF MIXED LAW AND FACT AS TO THE RIGHT OF THE RAILWAY COMPANY TO THE LAND, AND THIS FORECLOSES MOST OF THE OBJECTIONS URGED BY COMPLAINANT AGAINST THE VALIDITY OF THE SELECTION.

The issuance of patent implies and includes an adjudication by a quasi-judicial tribunal, conclusive as to all questions of fact necessarily involved in the determination that the patentee is entitled to the land. Where, as in this case, the land conveyed by the patent is land within the jurisdiction of the Department, the patent is impervious to collateral attack, or to attack in an action at law, upon any ground; and it can only be attacked in equity upon the ground of fraud, plain mistake or palpable error of law. The courts will not, in any form of action, undertake to review any question of fact involved in the determination which the issuance of patent implies. All this is familiar doctrine, and it is unnecessary to cite authorities in its support. But the rule is the same where the adjudication which the patent implies involves questions of *mixed law and fact.*

In Marquez v. Frisbie, 101 U. S. 473, 476, Mr. Justice Miller said:

> "The language of this court in Moore v. Robbins, 96 U. S. 530, 535, cited above, is that equity will interfere 'when it is *clear* (italics

by the court) that these officers have, by a mistake of the law, given to one man the land which, on the undisputed facts, belonged to another.' This means, and it is a sound principle, that where there is a *mixed question of law and of fact*, and the court cannot so separate it as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive."

To the same effect are:

Green v. Hayes, 70 Cal. 276, 11 Pac. 716.

Wiseman v. Eastman, 21 Wash. 163, 57 Pac. 398, 401.

Cook v. McCord, 9 Okla. 200, 60 Pac. 497, 500.

Estes v. Timmons, 12 Okla. 537, 73 Pac. 303, 305.

Bates & Guild Co. v. Payne, 194 U. S. 106, 109.

Now it seems to us that many of the objections which complainant urges against the validity of the original selection by the Railway Company involve questions of mixed law and fact, as to which the judgment of the Department is conclusive under the rule referred to. This is obviously true of the proposition that the selection was invalid because there were other lands open to selection, as to which the Railway Company was required to exhaust its right before resorting to the land in controversy; such as land within the first indemnity limits and land nearer to the tract which was the basis for the particular selection. It is also true of certain of the objections based upon supposed irregularities in the selection lists and the proceedings thereon, and upon an alleged want of authority on the part of the representatives of the Railway Company

making the selection. And we think it is likewise true of the objection that the Northern Pacific Rail*way* Company did not lawfully succeed to the land and land grant rights of the Northern Pacific Rail*road* Company. It seems very plain to us that this question involves an issue of fact as well as an issue of law, and that upon the record in this case those issues cannot be separated so as to resolve the question into one of pure law, within the rule of Marquez v. Frisbie, supra.

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SUPREME COURT OF THE UNITED STATES.

No. 12. October Term, 1910.

CHARLES D. CAMPBELL,

Appellant,

vs.

FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD,

Appellees.

BRIEF FOR APPELLEES ON REARGUMENT.

FRANK B. KELLOGG,
STILES W. BURR,
Of Counsel for Appellees.

INDEX.

	Pages.
PRELIMINARY STATEMENT	1-5
STATEMENT OF FACTS	6-16
ARGUMENT	17-128
I. The complainant Campbell does not occupy a position which enables him to attack the patent title, even if it should appear that his application to enter the land was wrongfully denied and that patent ought not to have issued to the Railway Company	17-60
II. The Railway Company's selection, having been accepted and allowed by the local land officers, segregated the land against complainant's application to enter the same, so that no rights attached under that application, regardless of the validity or invalidity of the prior selection	61-83
III. The very terms of the timber and stone act itself preclude the idea that land subject to a pending railroad indemnity selection is open to entry or purchase under that act	84-89
IV. When the Railway Company's selection was finally approved by the Secretary of the Interior, and patent issued to it for the land, the approval and patent related back to the date of the original selection, and cut off all intervening claims	90-125
V. The patent must be treated as a conclusive adjudication of all questions of fact or of mixed law and fact as to the right of the Railway Company to the land, and this forecloses most of the objections urged by complainant against the validity of the selections	126-128

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PRELIMINARY STATEMENT.

The appellant here, who was appellant in the Court of Appeals also, was complainant in the Circuit Court. The appellees here were defendants in the Circuit Court and appellees in the Court of Appeals. As it will be necessary for us to refer frequently to another case in which the position of the parties is reversed in this court, we think it may prevent confusion if throughout this brief we refer to the appellant as complainant and to the appellees as defendants.

The case is a suit in equity to subject the patent title to the land in controversy to the alleged superior equitable claim of the complainant. The Circuit Court entered a decree dismissing the bill, which was affirmed by the Court of Appeals; and complainant has appealed to this court.

The defendants hold under patent of the United States, issued to the Northern Pacific Railway Company upon a selection of the land in controversy under the indemnity provisions of the Northern Pacific grants; the land having been conveyed by the Railway Company to defendants by warranty deed, prior to the commencement of this suit. The sole basis of complainant's claim is that on October 26, 1895, long subsequent to the selection of the land by the Railway Company, although prior to the approval of such selection by the Secretary of the Interior, complainant proffered to the Register and Receiver of the local land office of the district in which the land is situated, an application to purchase the same under the provisions of the act of June 3, 1878, familiarly known as the "Timber and Stone Act." The Register and Receiver rejected complainant's application on the ground that the land was subject to the prior selection thereof by the Railway Company; and this action of the Register and Receiver was affirmed on appeal. The Railway Company's selection was ultimately approved by the Secretary, and a patent for the land was duly issued to it.

After the issuance of patent to the Railway Company and the conveyance of the land to the defend-

ants, complainant brought this suit. The Court of Appeals held, independently of other questions in the case, that complainant did not occupy a status which enabled him to question the patent title in the courts; and affirmed the decree dismissing the bill without determining whether the officers of the Land Department ought to have accepted complainant's application and permitted him to purchase the land.

This case was submitted to and decided by the Circuit Court and the Court of Appeals at the same time with another case in which Herbert H. Hoyt was complainant and the defendants in this case were defendants; and that case is now before this court on appeal by the defendants under the title of Frederick Weyerhaeuser and John A. Humbird, appellants, v. Herbert H. Hoyt, appellee (No. 24 on the present calendar.) This court has before it, also, the case of Northern Pacific Railway Company v. Fred Wass and Pauline Wass (No. 181 on the present calendar), which comes here on writ of error from the Supreme Court of Minnesota. We shall have occasion to refer frequently in this brief to those cases, and for brevity we shall refer to No. 24 as "the Hoyt case," to No. 181 as "the Wass case" and to this as "the Campbell case."

These three cases were argued together at the last term (in the latter part of April, 1910); and on December 19, 1910, the three cases were restored to the docket for reargument, and were again set down to be argued together.

The Hoyt case is in many respects similar to the

Campbell case, and while there is less similarity in the Wass case, there are some questions—one of which is of the most vital character—common to all three cases. But there are also important elements of difference between them—the Hoyt case involves questions which are not present in the Campbell case; the Campbell case involves the question which the Court of Appeals made the sole ground for its decision in that case, but which does not appear in the Hoyt case or in the Wass case at all; and there is one point common to the Campbell and Wass cases which is not involved in the Hoyt case.

Most of the questions common to the three cases are discussed in the brief which will be filed herein by Mr. Charles W. Bunn, with whom we are associated as counsel for defendants in this case; and we do not intend to retraverse the ground covered by Mr. Bunn's brief. Our purpose is to confine this brief to the question peculiar to the Campbell case (which is the question that the Court of Appeals deemed decisive of the case); and to a discussion of some of the points common to this case and one or both of the other cases, supplementing, but not reiterating, the arguments in Mr. Bunn's brief.

We think it essential to a proper appreciation of the issues in this case that the court should consider the issues in the Hoyt and Wass cases in their relation to those of the Campbell case. And we believe that a clearer understanding of the situation will be given by a statement of the facts of the Campbell case, followed by a statement of the

points wherein the Hoyt case and the Wass case differ from this. But as we do not intend to argue all the questions which this case may possibly be held to involve, and as the other briefs to be filed will doubtless contain full statements of the facts, we think we may properly omit reference to matters which have no possible bearing upon the questions here to be argued.

(Note: The italics in quotations appearing in this brief are ours, unless the contrary is expressly indicated.)

STATEMENT OF FACTS.

On October 17, 1883, the Northern Pacific Railroad Company duly filed in the United States Land Office at Duluth, Minnesota, its selection list No. 15, whereby it applied to select the lands in controversy in the Hoyt and Campbell cases, and a quantity of other lands, as indemnity for specified losses within the place limits of its grant. The list so filed specified the lands lost, by specific description; but did not assign each selection to a particular description of land lost. This was in accordance with the practice of the Department at that time. Subsequently the practice was changed so as to require a specific loss to be assigned for each tract selected. Thereafter, on April 11, 1893, pursuant to the direction and with the permission of the Secretary of the Interior, the Railroad Company filed a rearrangement of said list No. 15, in which the same bases of lands lost were assigned, but a particular tract lost was assigned as a base for each tract selected. At the time of filing the original list the company tendered and paid the fees required by law. The Register and Receiver accepted and allowed the selections, and attached to the list a certificate which acknowledged receipt of the fees and which contained the following:

> "We hereby certify that we have carefully and critically examined the foregoing list of lands claimed by the Northern Pacific Railroad Company, under the grant to the said company by act of Congress approved July 2, 1864, and

joint resolution approved May 31, 1870, and selected by said Northern Pacific Railroad Company by Chas. B. Lamborn, the duly authorized agent, and we have tested the accuracy of said list by the plats and records of this office, *and that we find the same to be correct: and we further certify that the filing of said list is allowed and approved*, and that the whole of said lands are surveyed public lands of the United States, and within the limit of 40 miles on each side; and that the same are not, nor is any part thereof returned and denominated as mineral land or lands, nor claimed as swamp lands; nor is there any homestead, pre-emption, state or any other valid claim to any portion of said lands on file or record in this office." (Record, p. 2.)

The final approval of the selections by the Secretary of the Interior necessarily involved an affirmance of the findings of the Register and Receiver embodied in the foregoing certificate; indeed, the approval by the Secretary is based upon express findings to the same effect, made by the various examiners and chiefs of division and approved by the Commissioner (Record, pp. 93-96).

These selections were held up for many years, at first because of controversy as to whether Duluth or Ashland was the eastern terminus of the Northern Pacific grant, and later because of the contests waged in the Department by Campbell and other claimants. Meanwhile the Northern Pacific Railway Company succeeded to the rights of the Railroad Company under these selections, by foreclosure proceedings and judicial sale, and its successorship was in time duly recognized by the Interior Department, under advice of the Attorney General

of the United States. Finally on November 10, 1905, the selection of the land in controversy in the Campbell case was approved by the Secretary of the Interior (Record, pp. 93-96), and on November 13, 1905, a patent for the land was duly issued to the Railway Company (Record, p. 89); which had theretofore conveyed the land to the defendants by warranty deed. The selection of the tract involved in the Hoyt case was approved and patent issued some weeks earlier.

On October 26, 1895, the complainant Campbell presented to the Register and Receiver of the local land office an application to purchase the land in controversy under the act of June 3, 1878—the Timber and Stone Act. The Register and Receiver rejected the application on the ground that the land was already subject to the selection thereof previously made by the Railway Company. For the purpose of this argument, it may be conceded that Campbell possessed the necessary qualifications, that his application was in proper form, and that but for the prior selection of the land by the Railway Company it would have been open to purchase under that act and complainant's application should have been allowed. The bill also alleges that Campbell "renewed" his application on November 9, 1896, and again on December 28, 1897, but that on each occasion his application was rejected by the Register and Receiver on the same ground as before.

In order that the issue of law which we propose to discuss may be clearly defined, we state here

that the arguments in this brief will proceed upon the assumption that if the prior selection of this land by the Railway Company did not operate to withdraw or segregate it as against other claims subsequently initiated, and if, notwithstanding such selection, the land was still to be regarded as part of the unappropriated public domain, open to entry or settlement by any qualified person, then the action of the Register and Receiver was erroneous; otherwise complainant's application was rightly rejected.

Complainant appealed to the Commissioner of the General Land Office from the decision of the Register and Receiver rejecting his original application, but he took no appeal from the action of those officers on the successive "renewals" of that application. On August 31, 1900, the Commissioner filed a decision affirming the rejection of complainant's application. Action on that decision was suspended for a time; but on October 3, 1901, the Commissioner filed another decision finally rejecting the application (Record, pp. 4-8, 27-30).

Complainant appealed to the Secretary of the Interior, who, on September 6, 1905, rendered a decision affirming the action of the Commissioner and of the Register and Receiver. That decision was made upon the authority of the previous decisions of the Secretary in the cases of Eaton v. Northern Pacific Railway Company, 33 L. D. 426, and Jones v. Northern Pacific Railway Company, 34 L. D. 105 (Record, pp. 8-9). The opinion of the Secretary in the case of Jones v. Northern Pacific is

printed in the record in this case (Record, pp. 30-38).

This suit was commenced November 16, 1905, in the District Court of St. Louis county, Minnesota, whence it was removed by defendants to the United States Circuit Court. Complainant concludes his bill of complaint with the following prayer for relief:

> "Wherefore, this plaintiff prays that this Honorable Court by its decree will adjudge and decree that the patent issued by the United States to the Northern Pacific Railway Company was so issued under a mistake of law, *and that said patent be delivered up and cancelled; and that the plaintiff may proceed to final proof for the land* here in controversy; and that all persons claiming or to claim by or under the defendants be forever barred and enjoined from claiming any title, right or interest in said land adverse to this plaintiff, and for such other and further relief as may be just." (Record, p. 26.)

Complainant further prayed an injunction *pendente lite* against the cutting of timber on the land.

It appears affirmatively upon the face of the bill of complaint, as well as from the evidence, that complainant never tendered payment for the land at the local land office or elsewhere, and that he never offered to make the proofs required by law. He rested solely upon his declaratory statement or application, rejected by the local land officers; and neither before nor after the adverse decisions by the Commissioner and Secretary did he make any effort to comply with the requirements as to proof

and payment which are necessary prerequisites to the acquisition of land under the Timber and Stone Act. Complainant alleged in his bill that he

> "has at all times been ready and willing to perfect his title to said land by doing all things that the law requires of him, including the payment for the land; and would long ago have completed his entry by payment had he not been prevented from so doing by reason of conflicting claims to the same, etc." (Record, p. 9.)

But this is a very different thing from performance of the conditions which are essential to the acquisition of land under the public land laws, and very different from an actual *tender* of proofs and payment. Indeed, there is neither allegation nor evidence that complainant was ever *able* to make proof or payment. The allegation quoted above is the only thing in the bill which bears upon that subject, and all the evidence on the point is comprehended in the following questions and answers in the course of the examination of complainant, by his own counsel, as a witness in his own behalf:

> "Q. Have you at all times since your application in 1895 for this land been ready and willing to complete your entry by paying the amount the Government required for acquiring that land? A. Yes, sir.
>
> Q. Why have you not completed your entry? A. Well, because I couldn't. I had contest on the land and before I got that off I couldn't do anything after that.
>
> Q. Couldn't do anything on account of an order from the Department that nothing further should be done in such cases? A. Yes, sir." (Record, p. 80.)

In short, it not only appears affirmatively that there was no offer or tender of proof or payment, but there is also neither allegation nor evidence that the complainant was ever in position to make such proof or payment.

So far as concerns the questions to be argued in this brief, the essential difference between the Hoyt case and the Campbell case is this: On December 17, 1897, Hoyt's grantor, Jones, made a similar application to purchase, under the Timber and Stone Act, the land involved in that case. But instead of rejecting his application, the Register and Receiver received and allowed it; and on March 22, 1898, Jones was permitted to make final proof in the usual manner. Subsequently, on December 10, 1898, Jones paid the full purchase price for the land required by the provisions of the Timber and Stone Act, and the usual final receipt was issued to him. It is true that across the face of the receipt was written a memorandum to the effect that the receipt was issued "subject to any claim the Northern Pacific Railroad Company may have to the lands herein described"; but in other respects the receipt was in usual form. (See opinion in Hoyt case; Hoyt v. Weyerhaeuser, 161 Fed. 324, 326.)

Campbell's application was rejected when proffered, and he never made any offer of the requisite proofs and never paid or tendered payment of the required purchase price; while Hoyt's grantor made

the necessary proofs and payment and obtained a final receipt, so that nothing remained to be done on his part to entitle him to patent in case the land was open to his entry at the time it was made.

The Circuit Court held in favor of the defendants in both cases. The Court of Appeals held in favor of the defendants in the Campbell case, but against them in the Hoyt case; in the latter case reversing the decree dismissing the bill, and directing the entry of a decree in favor of the complainant.

The distinction between the cases, and the ground upon which the Court of Appeals denied complainant relief, is thus stated by Judge Sanborn, in delivering the opinion of that court (Campbell v. Weyerhaeuser, 161 Fed. 332):

> "The facts of this case differ from the facts in that (the Hoyt) case in this: In Hoyt's case his remote grantor Jones entered, purchased and paid for his land * * * before its selection by the Railway Company had been approved by the Secretary of the Interior. In this case the complainant Campbell repeatedly filed with the Land Department his application to enter the land * * * before the Railway Company's selection of that land was approved by the Secretary of the Interior, but the officers of the Land Department rejected his application each time and refused to permit him to enter the land. In Hoyt's case Jones became the vendee of the United States, paid for and became the equitable owner of his land. In this case Campbell was refused permission to purchase the land he seeks, he never entered or paid for it, his right to buy it was never recognized by the United States, and he was never in privity with it. The difference is radical and fatal to this suit in equity. One who has never by acceptance of a grant, or by

> settlement and improvement, or by occupation, or by entry, or by payment, placed himself in privity with the United States in title before a patent issues to another, may not maintain a bill in equity to charge the title under the patent with a trust in his favor (Citing Smelting Co. v. Kemp, 104 U. S. 636, 647, and other authorities). The indispensable basis of a suit in equity to charge the legal title to land under a patent is an equitable interest in the land in the complainant which is superior to the legal title in the defendant."

And it was held accordingly that Campbell's bill was properly dismissed. But in the Hoyt case, on the contrary, Hoyt was held entitled to a decree.

Insofar as is material to the questions which will be discussed in this brief, the facts in the Wass case are as follows:

On December 31, 1877, the Western Railway Company of Minnesota filed in the proper Land office a list of selections under the indemnity provisions of its grant, which included the land involved in the Wass case. Afterwards, on December 4, 1889, the St. Paul & Northern Pacific Railway Company, as successor in interest of the Western Railway Company, filed an amended selection list, including the same lands, and on February 12, 1892, filed a rearranged list, in which for the first time it designated a particular loss as the basis for each of the tracts selected as indemnity. On February 16, 1905, the selections were approved by

the Secretary of the Interior, and on March 15, 1905, a patent for the land was issued to the Northern Pacific Railway Company, as successor in interest of the Western Pacific and St. Paul & Northern Pacific companies.

In the month of April, 1899, years after the Railway Company's selections were made, but prior to the approval thereof by the Secretary of the Interior, Wass (who was a qualified homesteader) settled upon the land, intending to acquire the same under the homestead law. On December 4, 1899, he made due application to the local land officers to enter the land as a homestead, and tendered the prescribed fees; but his application was rejected for conflict with the pending selection by the Railway Company. Wass appealed, but the Commissioner and the Secretary successively held that the Railway selection was valid on its face and segregated the land as against Wass's application and settlement rights; and affirmed the rejection of his application. Notwithstanding these adverse decisions by the officers of the Land Department, Wass continued in possession of the land, claiming it as his homestead, at all times from the date of his original settlement to the present day. He established his home thereon, improved and cultivated the land, and in all respects complied with the requirements of the homestead law. At the time patent was issued to the Railway Company, and (of course) at the time suit was commenced, he had resided on and cultivated the land for more than five years; so that, if the land was subject to

his homestead entry at the time he settled thereon or at the time he made application to enter the same, he had fully earned it under the homestead law and was entitled to patent therefor (Record, Wass case, pp. 6-8).

It seems unnecessary to point out the very plain distinction between the Campbell case and the Wass case with respect to the question upon which the Court of Appeals grounded its decision in the Campbell case, viz.: the question whether the claimant against the patent had done those things necessary to give him a status which entitled him to attack the patent title. In this respect the Wass case seems to come within the rule of such cases as Ard v. Brandon, 156 U. S. 537; Brandon v. Ard, 211 U. S. 11; and Osborn v. Froyseth, 216 U. S. 571; cited elsewhere in this brief.

But the Wass case is like the Campbell case (and unlike the Hoyt case) in this, that at the time Wass initiated his settlement and at the time he tendered his application to enter, and at the time Campbell tendered his application to purchase, the land in question was subject to an indemnity selection by the Railway Company, valid and regular upon its face, which had been accepted and allowed by the local land officers, and which then stood of record, uncancelled and in full force. Under a familiar rule such selection, while it remained uncancelled of record, *segregated* the land, and raised an efficient barrier against the initiation of any adverse claim thereto, by setlement or by application to enter or purchase.

ARGUMENT.

I.

THE COMPLAINANT CAMPBELL DOES NOT OCCUPY A POSITION WHICH ENABLES HIM TO ATTACK THE PATENT TITLE, EVEN IF IT SHOULD APPEAR THAT HIS APPLICATION TO ENTER THE LAND WAS WRONGFULLY DENIED AND THAT PATENT OUGHT NOT TO HAVE ISSUED TO THE RAILWAY COMPANY.

In the sequence of argument which seems to us most natural and convenient, we shall first present the considerations and authorities in support of the conclusion reached by the Court of Appeals that the complainant Campbell does not have a status such as enables him to question the patent title in this suit.

As the principal authority for its decision, the Court of Appeals cites the great leading case of Smelting Co. v. Kemp, 104 U. S. 636, 640, 647. In that case Mr. Justice Field said:

> "The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and, as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands, under the law, is intrusted that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law. * * * If in issuing a patent its officers took mistaken views of the law, or

> drew erroneous conclusions from the evidence, or acted from imperfect views of their duty, or even from corrupt motives, a court of law can afford no remedy to a party alleging that he is thereby aggrieved. He must resort to a court of equity for relief, and even there his complaint cannot be heard unless he connect himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent; and he must possess such equities as will control the legal title in the patentee's hands. Boggs v. Merced Mining Co., 14 Cal. 279, 363. It does not lie in the mouth of a stranger to the title to complain of the act of the Government with respect to it. If the Government is dissatisfied, it can on its own account authorize proceedings to vacate the patent or limit its operation."

But there are other authorities, not referred to by the Court of Appeals, which furnish stronger support for its decision than the case specifically cited in the opinion. The leading case on this question is probably Bohall v. Dilla, 114 U. S. 47, although Sparks v. Pierce, 115 U. S. 408, and Lee v. Johnson, 116 U. S. 48, are cases as closely in point which are cited only less frequently than Bohall v. Dilla. In that case Mr. Justice Field said, on page 51:

> "To charge the holder of the legal title to land under a patent of the United States as a trustee of another, and to compel him to transfer the title, the claimant must present such a case as will show *that he himself was entitled to the patent from the Government*, and that in consequence of erroneous rulings of the officers of the land department upon the law applicable to the facts found it was refused to him. It is not sufficient to show that there

> may have been error in adjudging the title to the patentee. *It must appear that by the law properly administered the title should have been awarded to the claimant.* Smelting Co. v. Kemp, 104 U. S. 636, 647; Boggs v. Merced Mining Co., 14 Cal. 279, 363. It is therefore immaterial for the decision of this case what our judgment may be upon the conclusion of those officers as to the possession of the patentee."

In Sparks v. Pierce, 115 U. S. 408, 413, it is said:

> "To entitle a party to relief against a patent of the government, he must show a better right to the land than the patentee, such as in law should have been respected by the officers of the land department, and being respected, *would have given him the patent.* It is not sufficient to show that the patentee ought not to have received the patent. *It must affirmatively appear that the claimant was entitled to it,* and that in consequence of erroneous rulings of those officers on the facts existing it was denied to him. Bohall v. Dilla, 114 U. S. 47, 51."

In Lee v. Johnson, 116 U. S. 48, 50, the court said:

> "He (the plaintiff) must in all cases show that but for the error or fraud or imposition of which he complains *he would be entitled to the patent.* It is not enough to show that it should not have been issued to the patentee. It is for the party whose rights are alleged to have been disregarded that relief is sought, not for the government, which can file its own bill when it desires the cancellation of a patent unadvisedly or wrongfully issued. Bohall v. Dilla, 114 U. S. 47; Sparks v. Pierce, 115 U. S. 408."

In Steel v. Smelting Co., 106 U. S. 447, 454, Mr. Justice Field said:

> "So with a patent for land of the United States, which is the result of the judgment upon the right of the patentee by that department of the government to which the alienation of the public lands is confided, the remedy of the aggrieved party must be sought by him in a court of equity, if he possess such an equitable right to the premises *as would give him the title if the patent were out of the way.* If he occupy with respect to the land no such position as this, he can only apply to the officers of the government to take measures in its name to vacate the patent or limit its operation."

In all of the decisions cited above the conclusions announced represent the unanimous judgment of the court, and we cannot learn that these views have ever been criticised or departed from.

Upon the foundation of these authorities a great body of decisions has been built up in the State and Federal courts, in which the principle that the title derived under patent for land over which the Interior Department has jurisdiction can only be attacked by direct proceeding in equity, and then only at the suit of one who has himself performed all the conditions necessary to entitle him to patent, has been recognized, extended and applied.

In the very recent case of Leonard v. Lennox, 181 Fed. 760, (decided September 21, 1910), Mr. Justice Van Devanter, speaking for the Court of Appeals of the Eighth Circuit, said:

> "When a patent is issued by the officers of

> the land department, to whose supervision and control are entrusted the various proceedings incident to the disposal of the public lands, all reasonable presumptions are indulged in support of their action, and it is only when it is clear that some material error of law, imposition or fraud has resulted in the issuance of a patent to one applicant when it should have been issued to another that the action of those officers successfully can be called in question and the patentee declared a trustee for the unsuccessful applicant and required to transfer the title to him. To entitle an unsuccessful applicant to such relief it is incumbent upon him affirmatively and clearly to show not merely that his claim to the land was older or better than that of the patentee, but that it was such a claim as in law should have been respected by the land department, and, being respected, *would have given him the patent.* * * * *To entitle one to a patent it is essential, among other things, that he comply with all the requirements of the statute under which he seeks the title and the authoritative regulations of the land department thereunder.*"

In Peabody Gold Mining Co. v. Gold Hill Mining Co., 106 Fed. 241, Judge Morrow, after citing and quoting from some of the cases cited above, said:

> "It is alleged that said patent was fraudulently obtained from the land department. * * * But nowhere does it appear that the complainant would have been, at the time of the issuance of the patent, or would now be, entitled to the patent itself. * * * Conceding for the sake of the argument that the complainant could show that the patent should not have been issued to the respondent, this fact would not be sufficient and would not avail without the additional showing that the

patent should have been issued to the complainant."

In Baldwin v. Keith, 13 Okla. 624, 75 Pac. 1124, the syllabus, which is prepared by the court itself, thus states the point decided:

"In an action to declare a resulting trust, where the plaintiff claims the land under the homestead laws, an essential averment of the petition, and one without which the petition does not state a cause of action, is that the plaintiff has resided upon, cultivated, and improved the land *for a period of time and to an extent that upon final proof he would be entitled to a patent thereto.* It is not sufficient that the patentee ought not to have received the patent. It must affirmatively appear from the allegations of the petition that the claimant was entitled thereto, and that, in consequence of the erroneous rulings of the Secretary of the Interior on the facts existing, it was denied him."

In the opinion the court says:

"However, * * * it is quite obvious that the plaintiff in error cannot maintain this action, because of one elementary principle underlying all actions to declare a resulting trust. That is: 'To entitle a party to relief against a patent of the government of the United States, he must show a better right to the land than the patentee, such as in law should have been respected by the officers of the Land Department, and being respected, would have given him the patent. It is not sufficient to show that the patentee ought not to have received the patent. It must affirmatively appear that the claimant was entitled to it, and that, in consequence of the erroneous rulings of those officers on the facts existing, it was denied him.' Bohall v. Dilla, 114 U. S. 47; Sparks v. Pierce, 115 U. S. 408; Parker v.

Lynch et al., 7 Okla. 631, 56 Pac. 1082. If we were to concede that the defendant in error had no right to the patent to the land in controversy, by what right can the plaintiff in error contend that he is entitled to a patent thereto? In the petition it is alleged that he made application to file a contest, which contest was not entertained, but was rejected. * * * Again, he made application to enter the land. *This application gave him no vested right*, and particularly when the land was covered by an allotment entry. But it is alleged that the plaintiff in error established a residence upon the land and made improvements thereon. * * * But, notwithstanding this, still the plaintiff in error cannot maintain this action upon the theory that he had established a residence upon the land, *because he had not resided thereon a sufficient length of time to entitle him to a patent therefor*, even though the defendant in error had had no right whatever to the property. The petition does not contain an allegation that the plaintiff in error resided upon the land for any specific time, other than is shown by a copy of the affidavit which was filed before the Secretary of the Interior on the motion for review. * * * But even were we to look at the facts as shown by the copy of the affidavits contained in the record, still the record shows that the plaintiff in error did not reside upon the land for a period exceeding two years. *This would not entitle him to a patent from the government. He had not resided there a sufficient length of time to enable him to make final proof under the homestead laws, and, not being entitled to a patent from the government, he cannot maintain this action to declare a resulting trust.*"

In Chapman v. Quinn, 56 Cal. 266, affirmed in Quinn v. Chapman, 111 U. S. 445, the case was that of a pre-emptor who settled on the land and while

in residence thereon offered to file his declaratory statement, which was refused on the ground that there was a contest pending between other claimants. This Court afterwards held that this was no ground for refusing to receive Quinn's declaratory statement, but held that the equities were against him. Quinn's status, therefore, was that of a pre-emptioner who was in actual possession of the land, having settled thereon according to law, but whose application to file thereon had been wrongfully rejected by the land office. The court said:

> "The law under which he claims the right to pre-empt the land in controversy declares, among other things: 'That prior to any entry being made under or by virtue of the provisions of this act, proof of the settlement and the improvement thereby required shall be made to the satisfaction of the register and receiver of the land district in which such lands may lie.' This proof it is essential the defendant should make before *he* (italics by the court) could be entitled to enter the land; and of this proof the register and receiver are the exclusive judges, subject to the supervision and control of their superior officers of the Land Department. The courts have no power to substitute their judgment upon the facts of the defendant's alleged settlement and improvement of the land for that of the officers to whose judgment Congress has confided the determination of those questions. Cases are numerous in which the equitable rights of persons claiming under the pre-emption laws have been protected by the courts against the legal title acquired by other parties by means of the introduction of false testimony, or other imposition upon the officers of the Land Department, or by the misconstruction by those officers of the law, upon an admitted state of

> facts. But in all of such cases of which we have any knowledge, the party thus protected had connected himself with the title of the government, and thereby acquired some right which, in equity, entitled him to protection. We know of no case where the holder of the legal title under a patent from the government has been compelled by a court of equity to convey that title to one occupying the position of the defendant in the present action. To do so would be to compel the conveyance of the title from the grantee of the government to one who had established no right to purchase the land from the government itself. Nor do any of the cases cited support the position taken by the defendant."

In the course of that opinion the court examined and distinguished a number of the principal cases, most cited as authority, in which the relief sought in the case at bar was granted; showing that in every such case the claimant had himself earned the patent, having performed every act necessary to entitle him to it, and that the land should have been awarded to such claimant in the first instance. This is the distinction which seems to run through all the cases in the books, and is the basis for the rule which the Court of Appeals rightly applied against complainant in the case at bar.

Parsons v. Venzke, 4 N. D. 452, 61 N. W. 1036, affirmed by this court in Parsons v. Venzke, 164 U. S. 89, was a case where the plaintiff's pre-emption final certificate had been canceled arbitrarily and without notice, upon the ground that the pre-emptor had not complied with the law as to resi-

dence and improvements, and patent for the land had been issued to another; and the plaintiff undertook to subject the patent title to his alleged superior claims. The court held that if the entry was improperly canceled, the entryman would be protected in equity, but that it was incumbent upon him to show not only that the cancellation was arbitrary, but also that he himself was entitled to patent, *having earned the land by full compliance with all the requirements of law.* The opinion is a very elaborate one, in which many authorities are cited and examined, and in the course of it it is said:

> "Moreover, arbitrary action of the Department in cancelling the entry would not of itself entitle the plaintiff to the relief he seeks. He invokes equity to decree *that he is in equity entitled to the legal title. His position is that he had earned it.* and that the government held it in trust for him, and that the government's grantee also holds it impressed with such trusts. It is not the certificate which entitles him to the legal title. The right to the title comes from compliance with the law. * * * By showing that he had no opportunity to be heard before the Department, the entryman makes out a case for a hearing in court; but as he assumes the attitude of complaining of the action of the Department, he must show that it operated to his prejudice. As he is in the position of claiming the legal title, he must *prove by evidence that he has fully earned the same by an honest compliance with the law. The burden is on him.*"

Power v. Sla, 24 Mont. 250, 61 Pac. 468, presents a very careful opinion in which a large number of

authorities are examined. The court says:

> "It is incumbent upon them (the claimants against the patent) to show such facts as that it will appear therefrom that they have connected themselves with the original source of title in the government, and that their rights are injuriously affected by the existence of the patent. They must show such equities in themselves as will control the legal title in plaintiff's hands. (Citing numerous cases, including the decisions of this court previously cited in this brief.) Making the statement in another form, the defendants stand in no attitude to question the title of plaintiffs unless by their allegations they present facts showing not only that at the time the patent was issued to plaintiffs they (plaintiffs) were not entitled to it by reason of their failure to perform the conditions required by law, *but also that they themselves have performed all the conditions necessary to entitle them to demand a patent from the government.* The rule is deduced from the cases cited, that after the patent has passed to the entryman, mere strangers will not be heard to question the validity of the proceedings by which the patent was obtained. In such cases the government only can contest its validity in proceedings properly brought to set it aside. * * * The answer, therefore, fails to show that defendants so connected themselves with the government that they may assert title in themselves at the time plaintiff's patent was issued, and that their rights have been injuriously affected by an erroneous application of the law by the officers of the Land Department."

In Parker v. Lynch, 7 Okla. 631, 56 Pac. 1082, 1091, Parker, the complainant, had filed an application to contest the homestead entry of defendant, which application was erroneously denied. It was conceded that the defendant's entry was in fact un-

lawful, and that if Parker had been permitted to contest the entry, as he was legally entitled to do, he would have prevailed and would himself have secured the land under the homestead law. But he was denied relief; and the court, fortifying its opinion by liberal quotations from Bohall v. Dilla; Sparks v. Pierce; Lee v. Johnson, and Smelting Co. v. Kemp, *supra*, including all the language quoted from those decisions elsewhere in this brief, said:

> "The real question is, what right has Parker in this land? In order to win he must have a better equity than Lynch. He must have had an interest in the land that would have ripened into a title if the law had been properly administered. It is not sufficient for him to allege that Lynch was disqualified. * * * One who has no interest in the land cannot complain, because he could not be injured by the action of the Government in issuing a patent for the land to another."

Small v. Rakestraw, 28 Mont. 419, 72 Pac. 746, 748, affirmed by this court in Small v. Rakestraw, 196 U. S. 403, was a case very similar in many respects to Parker v. Lynch. The court there cited and applied the rule of Bohall v. Dilla, Smelting Co. v. Kemp, and Boggs v. Merced Mining Co., and quoted from Bohall v. Dilla the precise language which is quoted elsewhere in this brief. And the same rule was declared and applied, on the authority of the same cases, in Graham v. Great Falls Water Power Co., 30 Mont. 393, 76 Pac. 808, and in Gebo v. Clarks Fork Coal Mining Co., 30 Mont. 87, 75 Pac. 859. In the latter case the court said:

> "The very foundation of the rule is that the patent was issued to another when plaintiff was justly entitled to it. Then the complaint must show such facts as that it will appear therefrom that she has connected herself with the original source of title in the government, and that her rights are injuriously affected by the existence of the outstanding patent. She must show such equities in herself as will control the legal title in the defendant's hands. Power v. Sla, 24 Mont. 243, 61 Pac. 468; * * * She must show affirmatively that upon her part she did or offered to do *all that was necessary to be done in order to secure the patent*, and upon the doing of which patent should have issued to her, Bohall v. Dilla, 114 U. S. 47; and these in addition to the facts necessary to be shown in order to entitle her to make the filing in the first instance."

A recent case very much in point is Pierson v. Loveland, 16 Idaho, 628, 102 Pac. 340. That case deals with the disposition of certain Carey Act lands by the State Board of Land Commissioners, but, as will be seen from the opinion, the principles applied are those which control the disposition of the public lands of the United States. It appears that Loveland made an entry of the land in controversy but failed to comply with the law, so that his rights became forfeited; whereupon Pierson duly initiated a contest against Loveland's entry and applied to enter the land on his own behalf. The Board of Land Commissioners refused to consider Pierson's contest and rejected his application to enter. Pierson appealed from this decision of the Board, but the court held that an appeal from such a decision would not lie, and that his remedy was

by mandamus to compel the Board to hear his contest and allow his application. Meanwhile, the Board issued a patent for the lands to Loveland's assignee. Before patent was issued Pierson settled on the land, built a house thereon, cleared and cultivated a considerable area, and maintained actual residence thereon until forcibly ejected by Loveland's assignee. After patent had issued Pierson brought a suit in equity to have the patent title impressed with a trust in his favor. The court held that Pierson's contest was well brought and should have been entertained by the Board; that Loveland's entry was forfeited and should have been cancelled under that contest; that Pierson's application to enter the land should have been allowed by the Board; and that had he pursued the proper remedy, by mandamus to compel the Board to act on his contest and application, he must have prevailed—in short, that the Board committed an error of law in rejecting Pierson's contest and application and in awarding the land to Loveland's assignee and issuing the patent to him. Nevertheless the court held, following and applying the rule of the authorities cited above, that Pierson had no standing to question the patent title. It is said:

> "The question for determination is, does the complaint state a cause of action? It is well settled that in an action of this kind, to entitle a party to relief he must show a better right to the land than the patentee, such a right as should have been respected by the officers of the Land Department, and being respected would have given him the patent. Facts sufficient must be alleged to show *that the claim-*

ant was entitled to the patent and that in consequence of erroneous rulings of the land officers on questions of law, the patent was denied to him. It must contain allegations showing *that the plaintiff has done all of the acts required by law to be done and performed in order to entitle him to the patent*, or, at least, all of the acts which were in his power to do that were required by the law to be done, and offered to do any and all acts required by the law to be done, which he was prevented from doing by reason of the errors of law committed by the officers of the Land Department. It is admitted that the plaintiff was prevented from a hearing on his contest because of an error of law committed by the State Board of Land Commissioners. * * * After the plaintiff's contest was dismissed by said Board, he took an appeal from that action of the Board to the District Court. * * * In that appeal the plaintiff pursued the wrong remedy. * * * Had the plaintiff proceeded in that way (by mandamus) his rights could have been fully protected. As he failed to do that, he has failed to do all that he might have done to protect his rights. * * * He not only failed and neglected to proceed as above indicated, but his counsel admit *that he failed to procure a water right and failed to offer final proof for said land.* As he neglected and failed to do and perform those things, he is not in a position to maintain this action, for under the well settled rule of law in this class of cases, the plaintiff must allege *the performance of all the acts required by law necessary to show that he was entitled to the patent at the time the action was commenced*, with the exception of those acts which he was prevented from performing or offering to perform by reason of the error of law committed by said Board. In Bohall v. Dilla, 114 U. S. 47, the court had under consideration a case something like the one at bar, and said: (The court then quotes from Bohall v. Dilla the

identical language quoted from that opinion on a preceding page of this brief). Even if the State Board had not made an error of law, it does not appear from the allegations of the complaint that the appellant would have been entitled to receive a patent for said land at the time patent was issued to Diehl, he not having complied with the part of the law requiring him to present his final proof showing certain facts, and showing that if he had not complied fully with the law that his reason for non-compliance was the errors in law committed by the Board in granting said extension of time. The case of Sparks v. Pierce, 115 U. S. 413, involved the question of relief in equity against a patent issued by the United States: (Here follows a quotation of the same matter quoted from Sparks v. Pierce earlier in this brief). In support of that rule, the court cites Bohall v. Dilla, 114 U. S. 47. See also Quinn v. Chapman, 111 U. S. 448; Lee v. Johnson, 116 U. S. 53; Cunningham v. Ashley, 14 How. 379; Parker v. Lynch (Okla.) 56 Pac. 1082; Baldwin v. Keith (Okla.) 75 Pac. 1124; Jameson v. James (Cal.) 100 Pac. 700."

It will be noted that the Idaho court held that Pierson failed to comply with two different classes of requirements necessary to be observed in order to give him a status which would enable him to attack the patent, viz.: not only in his failure to pursue the proper remedy to compel the Board of Land Commissioners to hear his contest and receive his application, but also in his failure to make proper final proofs and to obtain a water right—although it is plain that he was deterred from doing these latter things by the refusal of the Board to recognize his claim. And it was held that a failure in either respect was enough to bar an attack upon

the patent title, even had the other requirement been complied with. This answers the suggestion, should it be made, that the rejection of his initial application to purchase the land relieved Campbell from the duty of offering proofs and payment, because such offer would be useless in the face of the refusal of the officers of the Land Department to entertain the application. This is a phase of the subject which will receive further consideration elsewhere in this brief.

In Deweese v. Reinhard, 61 Fed. 777, decided by the Circuit Court of Appeals for the Eighth Circuit and affirmed on another ground in Deweese v. Reinhard, 165 U. S. 386, Judge Thayer says:

> "At the threshold of this case we are confronted with the question whether the appellant stands in such privity with the United States as entitles him to maintain a suit to annul the certification of the land in dispute to the State of Nebraska, which act on the part of the Secretary of the Interior had the legal force and effect of a patent. * * *We do not dispute the general proposition that a person becomes the equitable owner of a tract of land forming a part of the public domain, if it has been surveyed and placed on the market, when he makes prior settlement thereon under the pre-emption or homestead laws of the United States, *and subsequently complies with all of the terms and conditions of those laws which entitle him to a patent.* It may also be conceded that the right of a homestead or pre-emption claimant to a patent, *when he has made a lawful settlement and done everything required of him to perfect his claim*, cannot be prejudiced either by the intentional misconduct of the officers of the Land Department

> or by their mistakes of law or neglect of duty. Moreover, it may be admitted that the holder of an equitable right or title to a tract of land which has been acquired in the manner aforesaid by a lawful settlement thereon, *and by the performance of such other acts as the law prescribes to entitle a settler to a patent*, stands in privity with the government, in such sense that he may maintain a bill to cancel a patent erroneously issued to a third party for the same land after the settler's rights had become vested."

In Hartman v. Warren, 76 Fed. 157, 163, Judge Sanborn, speaking for the Court of Appeals for the Eighth Circuit, said:

> "Can one who has acquired no right to a tract of land maintain a suit in equity to charge the owner of it with a trust in his favor, because the United States sold and granted it to that owner through an error of law? This is the next question in this case, and it is not a new question in this court. It was carefully considered and answered in the negative in the case of Deweese v. Reinhard, 61 Fed. 777."

Then after some discussion of the authorities the learned judge quoted from Smelting Co. v. Kemp, 104 U. S. 636, 647, the language quoted from that case on a preceding page of this brief, and continued:

> "*This is a wise and salutary rule. It relieves the government of the expense of vexatious litigation, and the owners of the land from the speculative attacks of those who have nothing to lose.* It has been repeatedly announced and uniformly maintained in the national court, and it is fatal to the suit of appellant in this case."

The Circuit Court of Appeals for the Ninth Circuit, in American Mortgage Co. v. Hopper, 64 Fed. 553, 556, an opinion in which Mr. Justice McKenna concurred, said:

> "The appellees relied upon the patent from the government of the United States. The suit is brought to obtain a decree declaring that the appellant is entitled to the patent, which was issued to appellee Hopper. To entitle it to this relief it was essential for it to *affirmatively show* that if the law had been properly administered *the title would have been awarded to it*. The suit cannot be maintained simply upon a showing that the land department erred in adjudging the title to the patentee. These principles are well settled, both in this court and in the Supreme Court of the United States."

In Sacramento Savings Bank v. Hynes, 50 Cal. 195, the defendant alleged, as an equitable defense in a suit founded upon a patent title, that he had the superior right to the land because he had entered it under the pre-emption law and had complied with all of the requirements of that law, except those relating to proof and payment; and that he had *offered* to make proper final proof and payment, but was wrongfully refused permission to do so. The court said:

> "The defendant cannot maintain the position that he is entitled in equity to the legal title which was acquired by the plaintiff, unless he, the defendant, *complied with the provisions of the pre-emption law applicable to his case*, or was prevented from so doing by some act by means of which the plaintiff acquired an undue advantage in the proceeding. Among others is the provision that the claimant must

> prove, to the satisfaction of the register and receiver, the facts upon which his claim rests. The allegation of the equitable defense that when the defendant appeared before those officers to prove his right of pre-emption, he was not permitted to make such proof because of the 'wrongful and fraudulent acts of the plaintiff,' is not the allegation of any fact which caused or induced those officers to refuse to hear his proofs. The allegation is too vague to be considered as the allegation of a fact."

Wirth v. Branson, 98 U. S. 118, is one of the cases in which the complainant was held entitled to relief. That case was decided before the rule upon which we rely had been declared and defined by this court in such cases as Smelting Co. v. Kemp, Bohall v. Dilla, Sparks v. Pierce, and Lee v. Johnson. But even then the limitation upon attacks on the patent title, with respect to the status which the complainant must occupy in order to maintain a suit of this character, was recognized by the court, as will appear by the following extracts from the opinion, which was by Justice Bradley:

> "The rule is well settled by a long course of decisions that when public lands have been surveyed and placed in the market or otherwise opened to private acquisition, a person *who complies with all the requisites necessary to entitle him to a patent* in a particular lot or tract is to be regarded as the equitable owner thereof. * * * This was laid down as a principle in the case of Lytle v. Arkansas, and has ever since been adhered to. See Stark v. Starrs, 6 Wall. 402. Subsequent cases which have seemed to be in conflict with these *have been distinguished from them by the fact that something remained to be done by the claimant to entitle him to a patent, such as*

the payment of the price, the payment of the fees of surveying, or the like. The proper distinctions on the subject are so fully stated in the cases of Stark v. Starrs, Frisbie v. Whitney, The Yosemite Valley Case, Railway Co. v. McShane, 22 Wall. 444, and Shepley v. Cowan, 91 U. S. 330, that it would be supererogation to go over the subject again."

There are a great many cases in the books, in addition to those already referred to, which in some form or other recognize the rule that the patent title to land over which the Interior Department had jurisdiction can only be attacked or questioned by direct proceeding in equity, and then only at the suit of one who has himself performed all the conditions entitling him to patent for the land. Some of these are cases where the complainant was held entitled to the relief sought, but where the rule stated was expressly recognized by the court; others are cases where complainant was denied relief under this rule, although the decision might have been put on a different ground; and still others are cases in which the facts were such that the rule was properly applied. But everywhere the rule has been accepted by the courts, and we have found no case in which it has been criticized or in which an attempt has been made to limit the rule or restrict its operation. The authority of Smelting Co. v. Kemp, Bohall v. Dilla, Sparks v. Pierce, and Lee v. Johnson has been universally acknowledged, and we cannot learn that the correctness of those decisions has ever been doubted or denied by any court of last resort. The length

to which we have already gone forbids further quotation from or discussion of the authorities on this point. We cite below a few additional cases to the same effect which are quite closely in point; but there are many others of more or less direct bearing which we think it unnecessary to give specific reference to:

Jameson v. James (Cal.) 100 Pac. 700.

Boggs v. Merced Mining Co., 14 Cal. 279.

Doll v. Meador, 16 Cal. 295.

Manning v. San Jacinto Tin Co., 9 Fed. 726.

Savage v. Worsham, 66 Fed. 852.

Carr v. Fife, 44 Fed. 713; affirmed in Carr v. Fife, 156 U. S. 494.

Johnson v. Fleutsch, 176 Mo. 452; 75 S. W. 1006.

Bangs v. Stephenson, 63 Mich. 661, 669; 30 N. W. 317, 320.

Janes v. Wilkinson, 2 Kan. App. 361; 42 Pac. 735, 737.

Frisbie v. Whitney, 9 Wall. 187.

The Yosemite Valley Case, 15 Wall. 77.

There are, of course, numerous cases in which the complainant has been held entitled to relief, or an equitable defense has been sustained, where one entitled to public land was deprived of patent thereto by fraud or mistake, or by errors of law on the part of the officers of the Land Department, and thereafter appealed to a court of equity for a decree subjecting the patent title to his superior equi-

table rights. But, as pointed out in several of the authorities cited above, in every case where such relief has been granted against the patent title, the complainant had performed every act necessary to entitle him to patent, so that nothing remained to be done as between him and the government, to completely earn the land; every condition precedent to the issuance of patent to him having been complied with before commencement of the suit.

In a sincere effort to exhaust the authorities on the subject, we have examined a great many cases in which the equitable claims of the complainant have been held superior to the patent title; but we have found no such case where anything remained to be done on the part of the complainant to entitle him to patent. Some of the cases may possibly convey a different impression on surface reading; but every such case will be found, upon analysis, to present the conditions indicated. We shall refer to and explain a few of the best known and most cited cases of this character, although these represent a very small proportion of those which have been examined and which fall within the definition given above.

Johnson v. Towsley, 13 Wall. 72, is probably the leading case. Towsley, the original complainant, entered the land under the pre-emption law, complied with all the requirements of the law as to residence, cultivation and improvement, made proper final proofs, paid the purchase price, and received the final certificate; so that patent would have been

issued to him in the regular course without any further act on his part. His entry was, however, contested by Johnson, who prevailed in the Department and was awarded the patent under a view of the law which the court afterwards held to be erroneous. Towsley remained in possession of the land at all times, and was evidently in possession thereof at the time he brought suit against Johnson. It will be seen, therefore, that Towsley's equitable title was complete, and that nothing whatever remained to be done to entitle him to patent. Cornelius v. Kessel, 128 U. S. 456, and the great case of Lytle v. Arkansas, 9 How. 314, were pre-emption cases where the conditions were very similar to those considered in Johnson v. Towsley.

Lindsey v. Hawes, 2 Black, 554; McCord v. Hill, 111 Wis. 499, 84 N. W. 27; Bogan v. Edinburgh Land Mortgage Co. (C. C. A. 8th Cir.), 63 Fed. 192; and George v. Riddle, 94 Fed. 689, are cases somewhat resembling Johnson v. Towsley and Cornelius v. Kessel. In each of these cases the complainant complied with all the requirements of law and his proofs and payment were accepted by the Land Department and final certificate issued to him; but the certificate and entry were afterwards wrongfully cancelled by action of the Department and patent erroneously issued to another.

In Tarpey v. Madsen, 178 U. S. 215, Madsen was the grantee of a railway company, which was entitled to the land under its grant, the Department having erroneously issued patent to a homestead claimant. This court held that patent should have

been issued to the railway company, and upheld a decree for Madsen, its grantee. All of the conditions of the grant had been complied with, and the railway company was entitled to patent without any further act on its part.

In Germania Iron Co. v. James, (C. C. A. 8th Cir.) 89 Fed. 811, and James v. Germania Iron Co., (C. C. A. 8th Cir.) 107 Fed. 597, the complainant had entered the land with a Porterfield land warrant. He made proper application, paid the fees required by law, and turned in his warrant; and the application, payment and warrant were duly accepted and the entry allowed by the local land officers. Nothing, therefore, remained to be done to entitle him to patent.

Ard v. Brandon, 156 U. S. 537; Brandon v. Ard, 211 U. S. 11; Duluth & Iron Range Co. v. Roy, 173 U. S. 587; Nelson v. Northern Pacific, 188 U. S. 108; Osborn v. Froyseth, 216 U. S. 571, and Trodick v. Northern Pacific (C. C. A. 9th Cir.), 164 Fed. 913, are cases of homestead claimants who made actual settlement on the land and complied in good faith with all the requirements of law respecting residence, improvement and cultivation, so as to fully earn the land under the homestead law, and who remained in possession of the land at all times up to the commencement of suit. The facts of the Wass case put it in this category, also.

Oregon & California Railway Co. v. United States, 189 U. S. 103, and 116, were cases where the Government brought suit for the benefit of settlers who were in precisely the same position.

The distinction between cases like Ard v. Brandon and cases like the one at bar, and the fact that the doctrine of Ard v. Brandon is applicable only to the case of a bona fide settler in actual occupancy of the land, is quite clearly pointed out in the following decisions of the Secretary of the Interior, rendered while Mr. Justice Van Devanter was Assistant Attorney General for the Department, and initialled in a manner which indicates that the opinions were prepared or approved by him.

Tubbs v. Northern Pacific Railway Co., 27 L. D. 86.

Drew v. Northern Pacific Railway Co., 27 L. D. 310.

Olesen v. Simonson, 27 L. D. 689.

In Duluth & Iron Range Co. v. Roy, *supra*, Roy, the claimant, had not completed his full five years' residence and cultivation at the time patent was issued to his adversary, and it was held that this was not fatal to his suit; the court declaring that it is not essential that at the moment of time the patent issues, the claimant should have so far completed his performance as then to be immediately entitled to patent. But in that case it appeared that after the patent issued Roy continued to reside upon, cultivate and improve the land, and that the full five-year period elapsed before the suit was commenced; so that *at the time the suit was brought* Roy had fully earned the land under the homestead law. Therefore, the Roy case is right in line with Ard v. Brandon and other cases cited

in a preceding paragraph, and is perfectly consistent with the authorities previously referred to in this brief. The Roy case is distinguished upon this general ground in United States v. Chicago, Milwaukee & St. Paul Railway, 195 U. S. 524, 539.

In some of these homestead cases the settler was not permitted to make final proofs, and in one or two cases the settler was deterred by the erroneous action of the officers of the Land Department from filing his preliminary application in the mode prescribed by law. But in all such cases the settler offered or attempted to do the thing omitted, and was prevented from doing so by error of the land officials; and the thing was held immaterial in view of the fact that the claimant had made full compliance with the law in respect to residence, improvement and cultivation, and was then actually occupying the land in good faith as his home. Moreover, the requisite proofs were in fact made as part of the evidence in the suit to establish the rights of the claimant. We think it clear that in each of those cases the claimant had really done everything necessary to entitle him to patent; but if those cases may be regarded as a relaxation of the strict rule, it was a relaxation only in favor of an actual settler who had fully performed the conditions necessary to the acquisition of a home; and reason for this is found in the familiar principle that the law deals tenderly with the settler who in good faith establishes his home upon the public lands and conforms to all the substantial demands

of the law, viz.: those which call for occupation, cultivation, improvement and continuous residence.

In Morrison v. Stalnaker, 104 U. S. 213, Cunningham v. Ashley, 14 How. 377, and Hess v. Bolinger, 48 Cal. 349, the claimant was a qualified pre-emptioner who had settled on the land under the pre-emption law and complied with all the requirements of that law as to residence, improvement and cultivation, and had duly made his final proofs and *tendered* payment of the purchase money, but such tender was refused by the land officials under error of law. In those cases it seems to have been assumed, without discussion, that under the circumstances there shown such tender was equivalent to payment, and the claimant was given relief in equity notwithstanding the tender was not accepted. But in every such case an actual tender of the money was clearly and unequivocally proved, and the claimant was further supported by the fact that he had in all other respects complied with the statute and was an actual settler on the land, which he had cultivated, improved and resided upon in conformity to law, and had made the required proof thereof.

There is as much reason for special leniency towards the actual settler under the pre-emption law as towards him who claims under the homestead law. The courts have never made any distinction between the two, but have ever shown favor and tenderness towards the rights of both. And this may be the reason why a mere unaccepted ten-

der of payment has sometimes been held sufficient in the case of a pre-emptioner, just as an unaccepted offer of proofs has been held good in the case of a homesteader, where the complainant was an actual settler in good faith, who had fully satisfied all other conditions, and who was then in residence upon the land.

For we have found no other case where a mere tender of payment or performance has been held sufficient to give the claimant standing to question the patent title. No court, so far as we know, has ever granted this extraordinary equitable relief to a would-be purchaser, not a settler upon the land, who had not paid the purchase money due to the United States under the law, on the ground that payment was excused by tender and refusal. In some cases it is intimated, *obiter dictum*, that tender might be as good as performance to give the status necessary for an attack upon the patent title; but we cannot find that it has ever been so held by any court, except in favor of an actual settler who had in all other respects complied with the law, and then only to the extent indicated in the decisions already cited.

And in no case has anything less than actual affirmative tender of the money been held sufficient to give the complainant the requisite standing against the patent, where his claim was made under a law calling for the payment of a purchase price to the government. The courts have yet to find a cause sufficient to excuse actual tender of the money, in cases where payment is not made and

where a right is claimed thereunder as a basis for an attack upon the patent title.

Now we may well concede that even under the timber and stone act, a tender of the purchase money, accompanied by an offer of proper final proofs, which is rejected by the land officials, is enough to give the complainant that privity with the Government which is essential to the maintenance of a suit to control the patent. In this case the complainant Campbell rested upon the rejection of his application, and made no effort whatever to comply with the law with respect to proof and payment. It is not pretended that he made any attempt to tender the purchase money or the required proofs; nor is it even claimed that he was prevented from doing so by any action of the officials of the Land Department. Indeed, a peculiar weakness of Campbell's case is that there is neither allegation nor proof that he was ever *able* to pay the purchase money or make the necessary proofs.

The theory upon which Campbell proceeds is that, his application having been rejected, it was unnecessary for him to go further; that the rejection of the application indicated that had proofs and payment been tendered the tender would *probably* have been refused; and that such rejection excused him from making any further offer of payment or performance.

That theory is incorrect in law, as we have

shown. It is not at all certain that even a tender of proofs and payment would have been enough to give complainant's claim the required status, but it is perfectly clear that nothing less than an actual tender is sufficient. There is no presumption that the land officials would not have done their duty—it cannot be assumed, as a matter of law, that they would not have accepted a proper tender properly made. Indeed, if we may conjecture as to the possible event, the acceptance of a similar tender in the Hoyt case makes it seem very probable that such a tender would have been accepted in the Campbell case also. But of course this is immaterial, for the question is not one to be tested by ordinary rules of conduct nor by principles of law applicable to ordinary commercial transactions. It is a question which must be determined in the light of the rules that have been built up for the safety and protection of those holding under patent from the Government; and in the light of those rules it is manifest that complainant has not performed those conditions necessary to give him standing to attack the patent title.

Let us not be misunderstood. We do not find it necessary to argue that if Campbell had gone into the Land Office prepared to furnish the proofs and make the payment required by law, and had failed then to make a formal production of his proofs or to offer his money across the counter, because deterred from doing so by some action or declaration of the local officers, his rights would be prejudiced by the omission, under those conditions, to make

an actual tender, in technical form. We may well concede that, under the circumstances supposed, the formal offer, in express terms, of money and proofs would be held excused. But we insist that in a case like this there must at least be some act which is practically equivalent to an actual offer or endeavor to comply with the law. And there is nothing of the sort, nor anything remotely resembling it, in the case before the court.

There is nothing in Campbell's situation which entitles him to particular consideration from a court of equity or which furnishes any reason for special leniency towards his failure to perform the prescribed conditions. Campbell was not a settler, but a speculator. He never lived upon the land and never intended to do so. He risked nothing, paid nothing, invested nothing. His only expenditure of time or money has been in the litigation conducted by him in the Department and the courts.

Campbell's position is very different from that of a settler who has spent several years of his life in establishing a home upon a tract of public land, and who has put his savings and the fruit of his labor into buildings and other improvements, and has enhanced the value of the land by clearing and cultivation; especially one who has done this in ignorance of adverse claims and in the honest belief that the land was subject to his entry—which was

true of the successful complainant in most of the cases cited above.

Campbell was a mere speculator, and he had full knowledge of the Railway Company's rights. He made his initial application, and conducted his contest in the Department, well knowing that the land had previously been selected by the Railway Company, in the hope that such selection would be defeated in law and the land be subjected to his entry. He went into the venture with eyes open and with full knowledge of its hazards. Had he done so in the honest effort to secure and establish a home, we might feel some sympathy for him. As it is, he is entitled to no more consideration than any other unsuccessful speculator.

In this connection the language of Mr. Justice Brewer in Moss v. Dowman, 176 U. S. 413, 417, and in Gertgens v. O'Connor, 191 U. S. 237, 246, in each case expressing the unanimous judgment of the court, is especially pertinent. In Moss v. Dowman, Mr. Justice Brewer said:

> "While undoubtedly under the provisions of the statutes and the regulations of the Land Department there are at times opportunities for a speculator to obtain title to public lands, it must be always remembered that *in the eye of the public land laws of the United States the speculator is never an object of favor.*"

And in Gertgens v. O'Connor, he said:

> "It is well to look further into his (the settler's) equities. It will be borne in mind that he did not go on the land until April, 1891. The tract was within the indemnity limits of the company's grant, and was therefore subject to selection. It had been withdrawn from

> entry under the land laws, and that fact appeared on the records of the local land office. It had in fact been selected by the Company, and that selection had not been cancelled. * * * He does not come within the letter of the statute, nor does he come within the reach of any reasonable equities. *He evidently took his chances on the possibility of the Company's failing to obtain title and a subsequent failure of Ireland to insist upon his preferential right of purchase. He went upon the land with full knowledge of all the facts, which showed that he had no right to enter, speculating upon possibilities which have not been realized, and having so speculated, he cannot complain if he suffer the consequences which often attend the failure of a speculation.*"

In Gertgens v. O'Connor the claimant to whom the quoted language applies was an actual settler who had cultivated and improved the land. The reasoning of that case therefore applies with greater force to a speculator like Campbell, who put nothing at risk and sustains no loss through his failure to acquire the land, except the loss of a profit he might have made.

In Manning v. San Jacinto Tin Co., 9 Fed. 726, 732, cited on a preceding page of this brief, the court said:

> "But complainant has no standing to impeach the transaction on another ground. He has no apparent title from the United States. His right, whatever it may be, is at best, only inchoate. It is a mere privilege; a first right to purchase or pre-emption right under the acts of Congress, of which he may avail himself or not as he chooses if he should succeed in vacating the patent. *He is not bound to pur-*

> *chase of the Government, and may abandon his claim at any moment. Neither he nor his grantor has ever tendered the purchase money to the United States* or to defendant, or applied for a patent, and it so appears in the bill, and *non constat* that he ever will do either. He is in no better poition as regards title, in his relation to the Government, than the parties in Hutton v. Frisbie, and Frisbie v. Whitney, 9 Wall. 187. Complainant as yet has no privity with the government in the lands in dispute, and no ground for equitable relief on that score. Doll v. Meador, 16 Cal. 295."

This language is singularly apposite to the case at bar. Like the complainant in that case, Campbell "has never tendered the purchase money to the United States." Like that complainant, "he is not bound to purchase of the Government, and may abandon his claim at any moment." To give Campbell in this suit the benefit of the patent which was granted by the Government to the Railway Company, under which defendants now hold, is to give him something which he never paid for and never tendered payment for; to give him the benefit of an *option*, a speculation, in which he never put a penny at risk, and from which he might have withdrawn at any time, and may still withdraw, without having invested or lost a dollar, should events occur (such as the destruction by fire of the timber on the land) which would make the speculation appear unprofitable. This is something a court of equity should not do. In this view also, the fact that Campbell has not alleged or proved that he was ever prepared to make actual payment of the purchase money is quite significant.

Campbell cannot complain that there is anything novel in the doctrine which forbids him from maintaining this suit. For years the decisions of the Land Department have marked a clear distinction between the rights of an applicant under the timber and stone law whose application is rejected or suspended, and who makes no further effort to comply with the law, and the rights of one who, notwithstanding such rejection or suspension, offers the proper proof and tenders payment of the purchase money, even though the tender is refused. And those decisions, read in the light of the rule established by this court in such cases as Smelting Co. v. Kemp, Bohall v. Dilla, Sparks v. Pierce and Lee v. Johnson, made it absolutely plain that if Campbell would thereafter appeal to a court of equity to subject the patent title to his alleged superior claims, he must establish his status by making the necessary proof and payment, or at least by making an actual unqualified tender thereof. This Campbell did not do, and the omission is fatal to his suit, even if all other questions might be resolved in his favor.

Burns v. Bergh's Heirs, 37 L. D. 161.
Heirs v. William Friend, 5 L. D. 38.
Capprise v. White, 4 L. D. 176.
California v. Nickerson, 20 L. D. 391.
Board of Control v. Torrence, 32 L. D. 472.
Jones v. Northern Pacific, 34 L. D. 105, 111.

If there is any seeming harshness in this rule, it is more apparent than real. The remedy of a suit in equity to control the patent title is an extraordinary remedy, which is not founded on statute, but which has been built up by the courts, year by year, decision by decision. It is extraordinary in that it permits re-examination of a final adjudication by the tribunal which is vested with the jurisdiction to determine the very questions thus re-examined. And as the courts have built it up by their decisions, so they have defined it and limited its scope. Manifestly, it would not do to extend this remedy to all cases where an individual might find it to his interest to challenge a patent issued to another. Its use must be limited to those having a real and definite interest to be protected; such an interest as courts of equity generally take cognizance of. And so it was established that the remedy might be invoked only by one whose equitable interest was of a dignity equivalent to that of ownership. It was necessary that the line should be drawn somewhere, and it has consistently been drawn against claims which have not been carried far enough to give a right to patent. Again and again it has been held that the patent could be attacked in this manner only by one who was himself entitled to patent. The rule is firmly established, and it has never been departed from. And who shall say that it is not a just and reasonable rule?

But whatever may be said with respect to the propriety of the rule— *it is the law!*

In delivering the opinion of the Court of Appeals in the case at bar, Judge Sanborn well said:

> "The indispensable basis of a suit in equity to charge the legal title to land under a patent is an equitable interest in the land in the complainant which is superior to the legal title in the defendant. The right under the general land laws of every qualified citizen to enter any tract of land open to entry thereunder is not, and no one can convert it into, such an interest in land by making an application to purchase which the officers of the Land Department unlawfully deny. The right to allowance of such an application is a privilege merely, and not an equitable interest or title. The applicant acquires no equitable interest in the land by his application and its denial, and in the absence of such an interest no suit in equity can be maintained. * * * The applicant pays nothing for the tract he is refused permission to buy, his loss by the refusal is measurable in damages, he may purchase another tract, *and if courts of equity should entertain suits upon such applications and denials, they would become courts for the production, rather than the prevention, of a multiplicity of suits.*"

We are left in some doubt as to the position of complainant's counsel with respect to the point now under discussion. But their arguments in the Court of Appeals and on the former hearing in this Court, considered in the light of the assignments of error filed in the Court of Appeals on the appeal to this Court (Record, p. 190), indicate that counsel hold that if Campbell is not entitled to a decree adjudging defendants to hold the patent title in

trust for him (and we surmise that this will be conceded in the light of the authorities marshalled above), he is at least entitled to a decree cancelling the patent and permitting him to complete and perfect his entry.

This was undoubtedly the theory upon which the suit was brought, since it is the specific relief prayed in the bill of complaint (although it is true that the prayer for general relief would have entitled complainant to a broader decree if warranted by the facts and the law), and it was the theory upon which his counsel presented his case to the Court of Appeals.

But if complainant is not entitled to a decree declaring the patent title impressed with a trust in his favor and requiring the defendants to transfer the title to him, or something of equivalent import, then he is not entitled to a decree at all. For it is well settled that a suit to cancel the patent and restore the land to the jurisdiction of the Land Department cannot be maintained by an individual, but only by the Government itself.

The rule is exactly stated by Judge Morrow of the Ninth Circuit in Peabody Gold Mining Co. v. Gold Hill Mining Co., 106 Fed. 241, 243, thus:

> "The mere cancellation of the patent with the reversion of the land to the Government is not within the province of a private party to effect by a suit in equity; that privilege rests only with the Government."

The first case in which this question was discussed seems to be Silver v. Ladd, 7 Wall. 219, 228, where Mr. Justice Miller said:

> "The relief given in this class of cases does not proceed upon the ground of annulling or setting aside the patent wrongfully issued. That would leave the title in the United States, and the plaintiff might be as far from obtaining justice as before. And it may well be doubted whether the patent can be set aside without the United States being a party to the suit. The relief granted is founded on the theory that the title which has passed from the United States to the defendant, inured in equity to the benefit of plaintiff, and a court of chancery gives effect to this equity."

In Smelting Co. v. Kemp, 104 U. S. 636, 647, Mr. Justice Field said:

> "It does not lie in the mouth of a stranger to the title to complain of the act of the Government with respect to it. If the Government is dissatisfied, it can on its own account authorize proceedings to vacate the patent or limit its operation."

In Steel v. Smelting & Refining Co., 106 U. S. 447, 454, the same great judge stated the point clearly in the following terms:

> "The remedy of the aggrieved party must be sought by him in a court of equity, if he possess such an equitable right to the premises as would give him the title if the patent were out of the way. If he occupy with respect to the land no such position as this, he can only apply to the officers of the Government to take measures in its name to vacate the patent or limit its operation. * * * This can be accomplished only by regular judicial proceedings taken in the name of the Government for that special purpose."

In Lee v. Johnson, 116 U. S. 48, he said:

> "He (the plaintiff) must in all cases show

> that but for the error or fraud or imposition of which he complains he would be entitled to the patent; it is not enough to show that it should not have been issued to the patentee. It is for the party whose rights are alleged to have been disregarded that relief is sought, not for the Government, which can file its own bill when it desires the cancellation of a patent unadvisedly or wrongfully issued."

In Carr v. Fife, 44 Fed. 713, affirmed in Carr v. Fife, 156 U. S. 494, Judge Hanford said, of a suit of similar nature:

> "This is not a suit to destroy the title conveyed by the patent. The plaintiff's object is rather to acquire that title for himself. Unless he can succeed in this, it matters naught to him in what manner or to whom the Government disposes of the land."

The most recent authority is Jameson v. James, 155 Cal. 275, 100 Pac. 700. That case is exactly in point. The plaintiffs had initiated a mineral claim to the land in dispute, and had in all respects complied with the law up to the time patent was issued to the defendant; but they had not made the complete compliance necessary to entitle them to patent. It appeared that the patent was obtained by fraud and in derogation of the rights of the plaintiffs. After examining the facts and authorities, the court concluded that the plaintiffs had not made such compliance with the law as to entitle them to control the patent title within the rule of cases like Bohall v. Dilla, Sparks v. Pierce, Lee v. Johnson, and Smelting Co. v. Kemp, *supra*, and then considered whether the plaintiffs were entitled to have the patent set aside in order that they

might complete their claims—which was the relief prayed in the complaint. In this connection the court said:

> "In the case at bar the plaintiffs do not seek to have the defendants held as trustees of the legal title conveyed by the patent. * * * It is not claimed by appellants (plaintiffs) that they * * * occupied 'such a status as entitled them to control the legal title.' They had never performed the acts necessary to vest in them the right to a patent. * * * The plaintiffs, then, not being themselves entitled to acquire title to the land, ask that the patent conveying it to defendant James be cancelled. That a patent obtained by fraud may be so cancelled is well settled; but inasmuch as the party injured by the fraud is the Government, whose title has been improperly obtained, *the action to annul the patent can be maintained by the United States alone.* A complainant in the position of these plaintiffs must, as is said in Steel v. Smelting Co., 106 U. S. 447, 'apply to the officers of the Government to take steps in its name to vacate the patent or limit its operation. This can be accomplished only by regular judicial proceedings taken in the name of the Government for that special purpose.'"

It is suggested in the brief of counsel with whom we are associated that the decision of the Court of Appeals in the Hoyt case rests upon the ground that the acceptance of Hoyt's application, proof and payment deprived the Department of jurisdiction, and that the subsequent approval of the Railway Company's selection and the issue of patent to it were without jurisdiction and absolutely void.

Now if the patent to the Railway Company were void for want of *jurisdiction* in the Department to issue it, it might be attacked collaterally or in an action at law; it is only a patent for land over which the Department had jurisdiction that is impervious to collateral attack and cannot be questioned except by direct proceeding in equity at the suit of one who is himself entitled to patent. And while it is not claimed that the decision in the Hoyt case involves a ruling that the Department was without jurisdiction to approve the selection and issue the patent to the Railway Company in the Campbell case, so that the question is really immaterial in this case, it may possibly cause some misunderstanding; and as it is easily disposed of, it seems best to get it out of the way.

We do not think the Court of Appeals can rightly be understood to have put its decision upon the ground indicated; indeed, it seems to us that this idea is expressly excluded by the language of the opinion itself. See Hoyt v. Weyerhaeuser, 161 Fed. 324, 330. At all events, the theory that the Department can be deprived of jurisdiction by the acceptance of proofs and payment on a claim of this character, or by anything short of the issue of patent itself, is wholly incorrect. It is uniformly held that wherever the Department is vested with authority to receive, consider and pass upon the claims of applicants to a tract of public land, it is deemed to have jurisdiction thereof; and this is only another way of saying that the Department

has jurisdiction over all land constituting a part of the public domain which has not been reserved, withdrawn or previously granted by authority of Congress. And when the jurisdiction of the Department has once attached, it continues until patent has issued. The issuance of patent, or the certification which is the equivalent of patent, is the act which terminates the jurisdiction of the Department. Therefore, in any case where the Department passes upon the conflicting claims of applicants for a tract of public land, and awards patent to one of them, its action, however erroneous, wrongful or mistaken; however arbitrary or contrary to law; is nevertheless a judgment within its jurisdiction, which is impervious to collateral attack and which can be challenged only by direct proceeding in equity.

Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 592.

United States v. Schurz, 102 U. S. 378, 402.

Orchard v. Alexander, 157 U. S. 372, 383.

Brown v. Hitchcock, 173 U. S. 473, 477.

Hawley v. Diller, 178 U. S. 476, 488.

King v. McAndrews, (C. C. A. 8th Cir.) 111 Fed. 860, and cases cited.

II.

THE RAILWAY COMPANY'S SELECTION, HAVING BEEN ACCEPTED AND ALLOWED BY THE LOCAL LAND OFFICERS, SEGREGATED THE LAND AGAINST COMPLAINANT'S APPLICATION TO ENTER THE SAME, SO THAT NO RIGHTS ATTACHED UNDER THAT APPLICATION, REGARDLESS OF THE VALIDITY OR INVALIDITY OF THE PRIOR SELECTION.

If the Circuit Court of Appeals was right in holding that complainant is not in position to attack the patent title under which defendants claim, because of his failure to perform the acts necessary to put him in privity with the United States, then his appeal was properly dismissed, even under the theory that the officers of the Land Department erred in rejecting his application to enter the land in controversy. But suppose we pass over that all-sufficient ground of defense and concede that complainant would be entitled to a decree if it could be held that the rejection of his application was an error of law. Under such a concession the case resolves itself into this question: Was the land in suit open to entry and acquisition under the timber and stone act at the time complainant offered his application to purchase the same, and was it then the duty of the officers of the Land Department to accept such application and permit entry and purchase thereunder, notwithstanding the prior selection by the Railway Company?

The Court of Appeals answered that question in the affirmative in the Hoyt case, on the supposed

authority of Sjoli v. Dreschel, 199 U. S. 564. But there is a rule of law not considered in the Hoyt case nor touched upon in Sjoli v. Dreschel which compels a contrary conclusion in the present case. That is the rule, firmly established by the decisions of this court as well as by numerous decisions of the Land Department and of other Federal and state courts, that an entry or selection of public land, accepted or recognized by the local land officers, segregates the land, and so long as it remains uncancelled of record, precludes the initiation of any other claim thereto; whether such entry or selection is regular or irregular, valid or void.

In this case the Railway Company made and filed its application to select the land, and paid the required fees, in exact accordance with the departmental practice and regulations in force at the time, and the same was accepted, approved and allowed by the local officers. This selection stood upon the records, intact and uncancelled, at the time complainant presented his application to purchase the land under the timber and stone act. Therefore, it constituted a complete barrier against complainant's attempt to acquire the land, and his application was rightly rejected by the land officers, even if every objection which complainant now makes against the validity of the Railway Company's selection were conceded to be well founded in law. Nor could any right, priority or other advantage accrue to him by virtue of that application in case the Railway Company's selection was afterwards cancelled—an application sub-

mitted under such conditions is a mere nullity, and nothing can be built upon it.

The latest declaration by this court of the rule here invoked is found in McMichael v. Murphy, 197 U. S. 304, and Holt v. Murphy, 207 U. S. 407, both of which cases involved the same land. The facts in those cases were these: On April 23, 1889, one White was permitted to make homestead entry of the land. Subsequently, two other parties attempted to enter the land, and on July 16, 1889, in a contest before the local land officers, it was held that all three claimants were disqualified because of their violation of the proclamation opening the tract to settlement, and that White's entry should be cancelled. An appeal was taken to the Commissioner of the General Land Office, who, on March 7, 1890, affirmed the ruling of the local officers and held White's entry for cancellation. White appealed to the Secretary of the Interior, who, on July 21, 1891, affirmed the decision of the Commissioner. McMichael settled on the land on June 3, 1889; and on July 21, 1889, he made application to enter it under the homestead law, but his application was rejected for conflict with White's entry. This was after the decision of the local officers holding White's entry for cancellation, but prior to the decision of the Commissioner on appeal. Again on August 31, 1889, McMichael made application to enter the land, and this second application was received, but "suspended" to await the result of the contest between White and the other claimants. On March 11, 1890, after the de-

cision of the Commissioner cancelling White's entry, and before the appeal to the Secretary from that decision was taken, although within the time allowed by law for such appeal, Holt filed a soldier's declaratory statement for the land, which was "suspended" by the Register and Receiver pending final action on White's appeal. Afterwards, on November 29, 1890, while the appeal was pending and before decision thereon, White filed a relinquishment of his entry, and Murphy immediately made a homestead entry on the land. After considerable litigation before the Department, Murphy was awarded the patent. McMichael brought suit in equity to have Murphy adjudged trustee of the patent title for his benefit; but a decision in favor of Murphy was affirmed by this court in McMichael v. Murphy, supra, and a similar suit brought by Holt was disposed of in Murphy's favor in Holt v. Murphy, supra.

It will be observed that White's entry was cancelled for an infirmity existing at the time the entry was made, viz.: disqualification on White's part to make the entry, and that it had been held for cancellation by the local officers before McMichael's application was filed, and by the Commissioner before Holt tendered his declaratory statement. Moreover, Holt's statement was not rejected by the local officers, but was "suspended pending final action on the appeal"; so that if the filing of an application under such conditions could give any right or priority to the applicant, Holt's claim would have been protected as against the subse-

quent entry by Murphy. The same thing is true of McMichael's second application. Nevertheless, it was held that neither McMichael nor Holt acquired any rights under their applications.

In the opinion in the McMichael case, Mr. Justice Harlan says (page 311):

> "While the entry remained uncancelled of record, by any direct action of the land office or by relinquishment, could another person, by making an entry, acquire a right in the land upon which a patent could be based? If not, then McMichael acquired no right by his entry or application to enter. * * * McMichael's entry having been made at a time when White's entry remained uncancelled, or not relinquished, of record, conferred no right upon him for the reason that White's entry, so long as it remained undisturbed of record, had the effect to segregate the lands from the public domain and make them not subject to entry. On White's relinquishment, they again became public lands subject to the entry made by Murphy. In addition it may be observed that the action of the Land Department under the statutes relating to the public lands has been in line with the above views. This appears from the decision in Hodges v. Colcord, and from the opinion of the Secretary of the Interior in McMichael v. Murphy, 20 L. D. 147. It is our duty not to overrule the construction of a statute upon which the Land Department has uniformly proceeded in its administration of the public lands, except for cogent reasons."

In the opinion in the Holt case, Mr. Justice Brewer says (page 412):

> "The Supreme Court, however, rested its decision largely upon this rule of law: That whenever an entry has been made of a tract of land, that tract is segregated from the mass of public land subject to entry until the exist-

ing entry is disposed of. Counsel for appellant do not question the general rule as to the effect of an entry regular upon its face, and concede that it is no longer open to doubt in view of the many rulings of the Land Department and the decisions of this Court. Hodges v. Colcord, 193 U. S. 192, McMichael v. Murphy, 197 U. S. 304, the latter involving the land in controversy. But they seek to distinguish this case in that the local land officers had held all the claimants disqualified, and that on appeal the Commissioner of the General Land Office, on March 7, 1890, had affirmed their ruling * * * and held the entry of White for cancellation; that the application of Holt to enter was made on March 11, 1890, before any appeal had been in fact taken from the decision of the Commissioner to the Secretary of the Interior—in other words, at the time that Holt applied to make his entry there was no pending entry. It could not have been foretold whether White would appeal from the decision of the Commissioner of the General Land Office, and if he did not there would be no entry to conflict with Holt's application. They contend that the application of Holt should have been recognized as an application to enter the land to take effect if White should not appeal from the decision of the Commissioner, or if on appeal that decision should be sustained. In that way Holt would have been given priority over all subsequent entries."

The learned Justice then considers, discusses and quotes from a number of the Land Department decisions, concluding with the following quotation from Stewart v. Peterson, 28 L. D. 515:

"That this important matter of regulation may be perfectly clear, it is directed that no application will be received nor any rights recognized as initiated by the tender of an application for a tract embraced in an entry of rec

> ord, until said entry has been cancelled upon the records of the local office."

And he says further:

> "Hence, by this rule, which was in force at the time the patent was issued, the appellant took no rights, preferential or otherwise, by the declaratory statement filed in March, 1890. Such a rule, when established in the Land Department, will not be overthrown or ignored by the courts, unless they are clearly convinced that it is wrong. So far from this being true of this rule, we are of opinion that to enforce it will tend to prevent confusion and conflict of claims."

Hodges v. Colcord, 193 U. S. 192, cited by this court in the McMichael and Holt cases as authority for those decisions, was another Oklahoma case of the same general character as the McMichael and Holt cases, where the same conclusion was reached; although that case did not present some of the special circumstances of the later cases.

Other decisions illustrating and applying different phases of the same general principles are:

Hastings & Dakota Railroad Co. v. Whitney, 132 U. S. 357.

Sturr v. Beck, 133 U. S. 541, 548.

Whitney v. Taylor, 158 U. S. 85, 93.

Kansas Pacific Railroad Co. v. Dunmeyer, 113 U. S. 629, 644.

Witherspoon v. Duncan, 4 Wall. 210, 218.

Neff v. United States, (C. C. A. 8th Cir.) 165 Fed. 273, 281.

James v. Germania Iron Co., (C. C. A. 8th Cir.) 107 Fed. 597.

In the three Oklahoma cases the invalidity of the entry consisted of the disqualification of the entryman, and did not appear on the face of the record of such entry; and some emphasis is put, in the opinions, on the fact that the entry was "prima facie valid." But in Hodges v. Colcord the court refers with express approval to the language of Mr. Justice Lamar in Hastings & Dakota Railroad Co. v. Whitney, 132 U. S. 357, where he said:

> "Under the homestead law three things are needed to be done in order to constitute an entry on public land: First, the applicant must make an affidavit setting forth the facts which entitle him to make such an entry; second, he must make a formal application; and, third, he must make payment of the money required. When these three requisites are complied with, and the certificate of entry is executed and delivered to him, the entry is made—the land is entered. If either one of these integral parts of an entry is defective, that is, if the affidavit be insufficient in its showing, or if the application itself is informal, or if the payment is not made in actual cash, the register and receiver are justified in rejecting the application. But if, notwithstanding these defects, the application is allowed by the land officers, and a certificate of entry is delivered to the applicant, and the entry is made of record, such entry may be afterwards cancelled on account of these defects by the Commissioner or on appeal by the Secretary of the Interior. * * * *But these defects, whether they be of form or substance, by no means render the entry absolutely a nullity. So long as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain.*"

This language also received explicit approval in Sturr v. Beck, 133 U. S. 541, 549.

Now defects of the character defined in the foregoing quotation are such as appear upon the face of the record of the entry, and in such cases the validity or invalidity of the entry may be determined without reference to matters dehors the record. Nevertheless, in those cases, as well as in cases where the infirmity in the entry depends upon parol testimony and does not appear upon the record itself, it is held that where the entry has been accepted and allowed by the local land officers it effects a segregation of the land, and precludes the inception of any other rights thereto so long as such entry remains uncancelled.

Most of the cases cited above deal with homestead or pre-emption entries. But the rule is precisely the same in the case of a railroad indemnity selection or a selection under any of the lieu selection acts. This is well settled by the rules and decisions of the Land Department.

In the case of Southern Pacific Railroad Co., 32 L. D. 51, 53, (an opinion which appears to have been prepared by Mr. Justice Van Devanter, then Assistant Attorney General) it was said:

> "A railroad indemnity selection, presented in accordance with departmental regulations and accepted or recognized by the local officers, *has been uniformly recognized by the Land Department as having the same segregative effect as a homestead or other entry made under the general land laws.*"

The foregoing language is quoted with approval in Santa Fe Pacific Railroad Co., 33 L. D. 161, 162, where it is further said:

> "A pending selection list is therefore given *the same force in segregation of the land as an actual entry*, and lands so conditioned are within the rule fixed by circular of July 14, 1899, 29 L. D. 29."

The circular last above referred to contains the language which, in Holt v. Murphy, supra, Mr. Justice Brewer quoted approvingly from Stewart v. Peterson, 28 L. D. 515.

In Santa Fe Pacific Railroad Co. v. Northern Pacific Railway Co., 37 L. D. 593, 596, the question was whether certain unapproved indemnity selections by the Northern Pacific Company segregated the land as against certain lieu selections proffered by the Santa Fe Pacific Company, and the Secretary said:

> "This contention may be disposed of by reference to the instructions contained in the circular of July 14, 1899, 29 L. D. 29, which are to the effect that no application will be received or any rights recognized as initiated by the tender of an application for a tract embraced in an entry of record until such entry has been cancelled upon the records of the local land office. The term 'entry' as used in this circular has been construed uniformly to include any claim under the public land laws, which operates to segregate the land applied for from the public domain. The rule was promulgated in the interest of good administration, and it has been uniformly followed since its promulgation. Inasmuch as the record shows that the selections of the Northern

Pacific Railway Company had not been cancelled at the time of the applications submitted by the Santa Fe Pacific Railway Company, it follows that the latter selections were properly rejected."

The reason for the rule is thus stated in a later case, carrying the same title and involving the same sort of controversy as the case last cited (Santa Fe Pacific Railroad Co. v. Northern Pacific Railway Co., 37 L. D. 669, 671):

"Numerous laws have been passed by Congress from time to time providing for the disposal of the public lands, under some of which the lands may be purchased outright and the certificate of patent received immediately upon payment. Under other laws certain preliminary action is required, to be followed by intermediate action and perhaps later by final action on the part of the applicant and the various officers of the land department before the right to receive a patent becomes vested. The orderly administration of such divers laws has rendered it absolutely necessary for the land department, whose duty it is to administer such laws, to prepare rules and regulations governing applicants in their proceedings to acquire title and also governing the subordinate branches of the Department in carrying the laws into effect. Considerable difficulty having been experienced in disposing of conflicting claims presented for the same tract of land before the Department could finally dispose of other claims of record, rendered it necessary to issue a postive definite rule respecting this matter. The rule now in force and the one obtaining at the time the applications in question were presented is contained in 29 L. D., at page 29, and provides that no application will be received or any rights recognized as initiated by the tender of an application for a tract embraced in an entry of record

> until such entry has been cancelled upon the records of the local office. *The term 'entry' as used in these regulations has been uniformly held to include also my bona fide selection or application to locate.*"

The rule was applied to a conflict between a railroad indemnity selection and an application under the timber and stone act (which is precisely the sort of conflict involved in the case at bar) in Eaton v. Northern Pacific Railway Co., 33 L. D. 426, where it is said:

> "What was the status of Eaton's claim to this land on January 1, 1898? He had not at that time initiated a claim by settlement, entry, or purchase. He had, as before shown, on October 26, 1895, applied to purchase the land under the timber and stone act, which application had been rejected for conflict with the pending indemnity selection by the railroad company. * * * *So long as the railroad indemnity selection remained intact, the land embraced therein was not subject to entry or purchase under the timber and stone act, and no right or claim could be initiated by an application for such entry or purchase.* * * * It is true that during the pendency of his appeal the railroad selection was canceled under a decision of this Department since held by the Supreme Court to have been erroneous, but this cancellation was not in any way attributable to his appeal, and it has been repeatedly held that an appeal from the action of the local officers properly rejecting an application because the land described therein is not at the time subject to entry, confers no right upon the applicant, even though the land becomes subject to entry during the pendency of the appeal."

No rule of departmental procedure is more firmly established than this. And it is not of recent origin. We cite below a few of the numerous cases, in addition to those already referred to, in which the rule has been recognized and applied. Many of these cases were decided while Mr. Justice Van Devanter was Assistant Attorney General, and the opinions appear to have been prepared or approved by him. In every case it was expressly declared that while a selection allowed by the local officers, whether valid or invalid, remains uncancelled of record, it segregates the land against other claims and prevents other rights from attaching thereto.

Some of the cases cited below involve railroad indemnity selections, some state school land indemnity selections, some state selections under general grants, and some lieu selections under the Act of June 4, 1897. But it is probably unnecessary for us to point out the precise similarity, so far as concerns the application of this rule, between these various classes of selections—we think the most astute mind could find no basis for distinction between them in this respect.

Railroad indemnity selection:

Gallup v. Welch, 25 L. D. 3.

Hanson v. Roneson, 27 L. D. 382.

Northern Pacific Railway Co. v. Wolfe, 28 L. D. 298.

Olson v. Hagemann, 29 L. D. 125.

School indemnity selection:

Southern Pacific Railroad Co. v. State of California, 4 L. D. 437.

Southern Pacific Railroad Co. v. Cline, 10 L. D. 31.

George Schimmelpfenny, 15 L. D. 549.

St. Paul & Sioux City Railroad Co. v. State of Minnesota, 24 L. D. 364.

F. C. Finkle, 33 L. D. 233.

California and Oregon Land Co., 33 L. D. 595.

Santa Fe Pacific Railroad Co. v. State of California, 34 L. D. 12.

Santa Fe Pacific Railroad Co., 34 L. D. 119.

Lieu selection under act of June 4, 1897:

Porter v. Landrum, 31 L. D. 352.

O'Shee v. Coach, 33 L. D. 295.

Heirs of George Liebes, 33 L. D. 460.

State selection under quantity grant:

State of Minnesota v. Leng, 25 L. D. 432.

State swamp land selection:

Thomas v. Spence, 12 L. D. 639.

Aside from the authority of these decisions, which are in themselves controlling, there can be no logical distinction between an entry under the pre-emption or homestead law and a selection duly accepted and approved by the local officers. The term "entry" has been frequently defined, and in various ways, but it has never been held to comprehend anything more than a proper application, accompanied by affidavit when required, payment of the prescribed fees, and allowance by the local officers. It does not involve settlement upon the land itself, nor any recognition by the government

beyond the action of the local officers. And a railroad indemnity selection, before approval by the Secretary, has every characteristic of an entry thus defined. It comprehends an application to select the lands, verified by affidavit and submitted according to the regulations of the Department, payment of the prescribed fees, and acceptance and allowance by the local officers. These elements are all present in the case at bar.

Hastings & Dakota Railroad Co. v. Whitney, supra.

Chotard v. Pope, 12 Wheat. 586.

Lockwitz v. Larson, 16 Utah, 275, 52 Pac. 279.

We have said that the settled rule of the Department to this effect should be taken as controlling. This is so under the familiar doctrine that the construction given by the Department to a statute which it is charged with the duty of executing, and its rulings upon questions of practice and procedure in matters under its supervision, are entitled to great respect, and ought not to be disturbed except for the most cogent reasons, and that where that construction is long established and has been uniformly and consistently followed, it should be deemed conclusive upon the courts—unless in a case where error is most plainly manifest.

Holt v. Murphy, supra.

McMichael v. Murphy, supra.

Hastings, etc., Railroad Co. v. Whitney, supra.

United States v. Moore, 95 U. S. 760.

United States v. Burlington, etc., Railroad Co., 98 U. S. 334, 341.

Heath v. Wallace, 138 U. S. 573, 582.
United States v. Alabama, etc., Railroad Co., 142 U. S. 615, 621.
Orchard v. Alexander, 157 U. S. 383.
Hewitt v. Schultz, 180 U. S. 139, 156, 163.
Louisiana v. Garfield, 211 U. S. 70.

Again, the rule that an ordinary entry effects a segregation of the land is entirely built up upon departmental regulations and decisions—it is not based upon statute, nor, in the first instance, upon decisions of the courts. So, too, the rule that a railroad indemnity selection, allowed by the local officers, has the same segregative effect as a homestead entry, is likewise an outgrowth of departmental rules and decisions. Both rules have the same source, depend upon the same principles, and have the same practical justification. One finds as much support in reason, practical justice, and convenience of administration, as the other. Both give the same effect to substantially similar acts. If one can be sustained, as the rule with respect to an entry has been sustained by this court, it is not possible to draw a distinction against the rule which gives like effect to a selection.

This question as to the segregative effect of the Railway Company's selection was not involved in Sjoli v. Dreschel, 199 U. S. 564; and that case is not authority in the present case.

In that case Sjoli, a homestead claimant, settled on the land in 1884, and resided thereon continuously until patent was issued to him in 1901. The Railway Company made no attempt to select the

land until 1885, a year or more after Sjoli's settlement. The Department at first rejected Sjoli's application, but subsequently decided in his favor, canceled and disallowed the Railway Company's selection, and awarded the land to Sjoli, and patent was accordingly issued to him. Therefore, at the time Sjoli initiated his settlement the land was a part of the unappropriated public domain, open to his entry, and at the time his entry was finally allowed by the Department the Railway Company's selection was canceled of record.

Nor is there anything in the opinion in Sjoli v. Dreschel which touches the question of segregation. It may be true that the broad language of the opinion, read without reference to the facts there before the court, states a proposition inconsistent with the idea that an indemnity selection has any segregative effect prior to the approval thereof by the Secretary of the Interior. But we have shown that the facts of that case did not present the question at all. And there is nothing whatever in the opinion to indicate that the question of the segregative effect of such a selection was in the mind of the court or was considered or discussed in any way.

Now it is hardly to be supposed that this court, by its decision in a case where the question was not presented directly or indirectly, and where the matter was not referred to or considered in the opinion, would intentionally overturn a rule so firmly established by a long and uniform course of decision by the Land Department, and so well sanctioned by recent decisions of this court in cases in-

volving an identical principle. (Hodges v. Colcord, McMichael v. Murphy and Holt v. Murphy, supra.)

In Mr. Bunn's brief he suggests that it is unnecessary for defendants to claim a segregative effect for these selections; that it is enough to say that even though it were permissible to receive other applications and entries notwithstanding the pendency of such selection, such subsequent claims are subject and subordinate thereto, and that if the selection is valid and proper when made and is afterwards approved by the Secretary, the approval relates back to the original selection and cuts off such intervening claims.

This is, of course, perfectly true. If the approval of the Secretary relates back to the date of selection, and if the selection itself was regular and valid when made, then it is quite immaterial whether the allowance of such selection by the local officers effected a segregation of the land, regardless of possible invalidity of the selection, so as to prevent the initiation of any right to the land by a subsequent application or entry while the selection stood intact of record. And it is perfectly proper for counsel to argue his case upon that theory, if so advised—perhaps that is the theory which is most appropriate in the discussion of the Hoyt case, where an entry under the timber and stone act was allowed and approved, and payment accepted (although conditionally), at a time when the Railway Company's selection stood canceled upon the rec-

ords of the land office under a decision of the Department afterwards held by this court to be erroneous.

But Mr. Bunn's concession, made (as we must believe) only for the purpose of argument, and to give greater emphasis to the proposition that the approval of such a selection relates back and cuts off intervening claims, is so worded as to leave room for possible misunderstanding. For if what is said in that connection could be construed as a statement or admission that this court has ever held or declared that a railroad indemnity selection, valid upon its face and allowed by the local officers, does not segregate the land against the initiation of subsequent claims while such selection remains uncanceled of record (except as the language of the opinion in Sjoli v. Deschel may be given that construction), then it is manifestly misleading.

We have carefully re-examined, with this concession in mind, every case cited in Mr. Bunn's brief or in the opinion in Sjoli v. Dreschel; and in none of those cases, nor in any other case in the books, so far as we have read, have we found anything, in dictum or decision, which is in any respect contrary to or inconsistent with the Land Department rule set forth above, or inconsistent with the application to that rule of the principles declared by this court in Hodges v. Colcord, McMichael v. Murphy and Holt v. Murphy, or which furnishes any ground for a distinction between the form of entry considered in those cases and railroad indemnity selections allowed by the local officers.

And we respectfully submit that if there is anything in Sjoli v. Dreschel which may fairly be said to declare a different doctrine, it stands alone and unsupported; and that, for the reasons we have already set forth, it ought not to be regarded as authoritative.

But complainant may argue that by the action of the Commissioner of the General Land Office in 1897, based upon the erroneous ruling of the Secretary that Duluth was the eastern terminus of the Northern Pacific Railroad, the Railway Company's selection was, in effect, canceled; and hence that the segregative effect of the prior selection was destroyed or suspended during the time which intervened between such action and reinstatement of the selection; and consequently at the time when complainant "renewed" his application in December, 1897.

Now, it may well be doubted whether an erroneous cancellation, made in the manner stated, of a selection valid in fact and properly allowed by the local officers, would be effective for any purpose. But in order to simplify the issue, we may concede, for the purpose of the argument, that this action of the Commissioner amounted to a cancellation of the selection, and that thenceforth, until reinstatement, the selection had no segregative effect; so that if complainant's original application had been filed during that period, the defense that the land was segregated as against such an entry, regardless of

the validity of the selection, would not be available to defendants.

The record leaves some uncertainty as to the precise time when this cancellation was effected, but it seems quite plain that it was done pursuant to the Commissioner's order of July 17, 1897, and that it was therefore subsequent to that date. (Record, pp. 15-16.) However, it could not have been earlier than January, 1897, in any possible view; and it is quite immaterial whether the cancellation was made in January or July of that year.

Complainant's original application was filed October 26, 1895. The allegations of his bill with respect to the presentation of this application are quite full, and most of them are admitted in the answer or are established by proof. But the allegations of the bill with respect to his action in December, 1897, are very meager, and none of such allegations are admitted in the answer, nor is there a scintilla of evidence to support them.

The bill alleges that on December 28, 1897, complainant "did again renew his application to purchase said land, and again the local officers refused to allow" the application, but "received and filed" the same and "forwarded the same to the Commissioner of the General Land Office." A copy of the paper is annexed to the bill, and there are some allegations as to its *contents*. (Record, pp. 4-5, 28-30.)

The bill contains no allegation, in substance or effect, that in December, 1897, complainant possessed the requisite qualifications, or that he paid

or offered to pay the fees required by law to be paid upon such an application. As stated, there is no proof whatsoever upon the subject of this "renewal" of the application; and as the answer contains no admission on the subject, it was incumbent upon complainant to make proper proof. Moreover, complainant did not appeal from the action of the local officers on his 1897 application, and no notice was taken of it in any of the subsequent proceedings in the General Land Office or before the Secretary.

In short, it is perfectly plain that complainant abandoned his 1897 application, and elected to rely upon his original application of October, 1895. Complainant has evidently sought to maintain the integrity of his original application and to rest his case on that, taking what advantage he could from the allegation that this application was "renewed" in December, 1897. But an examination of his pleading and the attached exhibits (Record, pp. 4-5, 28-30) makes it apparent that the proceeding in December, 1897, was either a new application, or it was nothing at all; and that if complainant ever acquired any rights thereunder they have long since been abandoned and lost. Complainant having elected to stand on the first application; having acquiesced, without appeal, in the rejection of the 1897 application by the local officers; and having abandoned the later proceeding so far as his proofs in this case are concerned; cannot now claim any advantage thereunder, even if the allegations of his bill were such as to present the matter fairly.

We have not referred particularly in this connection, to the "renewal" application made in November, 1896, since that was long before the cancellation of the selections was ordered, and is therefore immaterial to the question immediately under consideration. But the showing with respect to the November, 1896, attempt is practically the same as that with respect to the attempt in December, 1897.

In the Wass case the railroad selections were allowed by the local officers and were never canceled, and Wass's claim was initiated years after the final corrected list of selections was duly filed and allowed. So there is no possible way for Wass, in his case, to avoid the question whether such a selection segregates the land against claims subsequently initiated. And the question must be disposed of in that case, whatever view the court may take in the Campbell case of the effect of the "renewal" of Campbell's application after the erroneout cancellation of the railroad selections.

III.

THE VERY TERMS OF THE TIMBER AND STONE ACT ITSELF PRECLUDE THE IDEA THAT LAND SUBJECT TO A PENDING RAILROAD INDEMNITY SELECTION IS OPEN TO ENTRY OR PURCHASE UNDER THAT ACT.

But if we lay on one side the question whether a railroad indemnity selection segregates the land as against subsequent claims, or if we assume that that question is put out of the case by the so-called "renewal" of Campbell's application after the erroneous cancellation of the indemnity selections and before reinstatement thereof, there is still another sufficient reason why complainant's application to purchase was rightly rejected by the officers of the Land Department. And aside from all other questions in the case, this point alone is enough to bar his present suit.

Section 1 of the Timber and Stone Act (Act of June 3, 1878, Chap. 151, 20 Stat. L., 89, as amended by act August 4, 1892, Chap. 372, Section 2, 27 Stat. L. 348) runs as follows:

> "That surveyed public lands of the United States within the public land states, not included within military, Indian or other reservations of the United States, valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale according to law, may be sold to citizens of the United States * * * at the minimum price of $2.50 per acre; and lands chiefly valuable for stone may be sold on the same terms as timber lands: *Provided that nothing herein contained shall defeat or impair any bona fide claim un-*

> *der any law of the United States*, or authorize the sale of any mining claim, or the improvements of any bona fide settler, or lands containing gold, silver, cinnabar, copper or coal, or lands selected by the said states under any law of the United States donating lands for internal improvements, education, or other purposes. * * *"

As originally adopted the act applied only to the states of California, Oregon and Nevada and Washington Territory. By the amendment of August 4, 1892, it was made to apply to all public land states. Therefore, as to Minnesota, in which the lands involved in the Campbell, Hoyt and Wass cases are situated, the act speaks as of the date of that amendment, viz. August 4, 1892. And the selections in controversy in these three cases were all made and perfected prior to that date. So whether the clause in the act which provides that "nothing herein contained shall defeat or impair any bona fide claim under any law of the United States" be construed to refer to claims existing at the time the statute was adopted, or (and this seems the more reasonable construction) to claims existing at the time the application to purchase the land under the act is made, this clause unquestionably applies to the selections here involved.

It should not require argument or the citation of authorities to demonstrate that, by the very terms of the statute itself, land which is subject to an existing bona fide claim in the nature of a railroad indemnity selection, which has not been abandoned but which is still pending before the Department

and pressed by the Railway Company, is not subject to entry or purchase under the act. It matters not whether such selection is valid in law, or whether it has been approved by the Secretary of the Interior. It is enough that rights under the selection are asserted in good faith by the Railway Company—since that is enough to constitute a "bona fide claim" within the meaning of the act.

It would be hard to find language of broader import than that of the clause quoted above. *"Any bona fide claim under any law of the United States"* —what terms could be used which would include more than this? The word "claim" has the widest possible significance; and surely the words "any claim under any law of the United States" are comprehensive enough to include a railroad indemnity selection in good standing. And as no question has ever been raised as to the good faith of the Railway Company in connection with these selections, they are clearly *"bona fide* claims" within the meaning of the act. As to the scope of the word "claim," when used in legislation of this character, see:

Newhall v. Sanger, 92 U. S. 761, 765.

Southern Pacific Railroad Co. v. United States, 38 Fed. 55.

Burlington & Missouri River Railroad Co. v. Abink, 14 Neb. 95, 15 N. W. 317.

United States v. Spaulding, 3 Dak. 85, 13 N. W. 357, 360.

The rule is too well established by the decisions of this court to require citation of particular cases

in support of the statement that where the language of the statute is such as to except from the operation of the granting act land which is subject to an existing *claim*, the mere pendency of the claim on the records of the land office (the same not having been abandoned, canceled or finally adjudicated upon, is enough to exclude that land from the act, without regard to whether the claim is really valid in law, and without regard to whether the same is afterwards abandoned or rejected, or is prosecuted to patent.

We think the only fair construction of the statute is that land subject to such a claim is not open to entry or purchase under the act while that claim stands. This being so, no right to the land in controversy could be acquired under complainant's application to purchase the same under the timber and stone act, whether that application was rejected by the local land officers or was accepted and allowed by them. And if the land was not open to such entry and purchase, then the complainant was not prejudiced by the denial of his application, and it is no concern of his whether the officers of the Land Department erred in awarding the patent to the Railway Company. The complainant must prevail on the strength of his own title or not at all.

This proposition is peculiarly applicable to the facts in the Hoyt case. In that case the Register and Receiver, pursuant to instructions from the General Land Office, accepted proof and payment

under the provisions of the timber and stone act from Hoyt's grantor, and issued to him the usual final receipt; but across the face of the receipt was written a memorandum to the effect that it was issued "*subject to any claim* the Northern Pacific Railroad Company may have to the lands herein described." Therefore acceptance of this receipt involved an express recognition, on the part of Hoyt's grantor as well as the Register and Receiver, of the Railway Company's claim; so that Hoyt can claim no advantage from such acceptance of his proofs and payment, as against the objection based upon the language of the timber and stone act.

It is very plain that whatever effect may be given the language of the opinion in Sjoli v. Dreschel in its application to a conflict between a railroad indemnity selection and the claim of a homestead settler (such as is presented in the Wass case) it can have no possible bearing on the facts of the Hoyt and Campbell cases, which involve applications to purchase under the timber and stone act. We have shown that by the very terms of the act itself lands subject to an existing bona fide claim are excluded from the operation of the act and from entry and purchase thereunder. And we have shown that, whatever else may be said of it and its effect, a pending railroad indemnity selection is at least a "claim" within the meaning of that act. Now all that is said in the opinion in Sjoli v.

Dreschel to the effect that such a selection does not, until approved by the Secretary of the Interior, bar other claims to the land, has reference only to claims based upon *"settlement and occupancy under the pre-emption and homestead laws"*; and considerable pains seem to have been taken to confine the expressions in the opinion to claims of that particular character and to leave no room for a construction which would extend those expressions to claims of another sort.

IV.

WHEN THE RAILWAY COMPANY'S SELECTION WAS FINALLY APPROVED BY THE SECRETARY OF THE INTERIOR, AND PATENT ISSUED TO IT FOR THE LAND, THE APPROVAL AND PATENT RELATED BACK TO THE DATE OF THE ORIGINAL SELECTION, AND CUT OFF ALL INTERVENING CLAIMS.

This proposition is the overshadowing issue in the Hoyt and Wass cases, and is very thoroughly discussed in Mr. Bunn's brief. We do not propose to go over the whole question, but only to present our views on a few of the phases which it takes. And we shall deal with it as a proposition independent of the rule that a selection allowed by the local officers segregates the land against other entries, whether the selection be valid or not—assuming, for the purposes of this branch of the discussion, that in order to defeat the complainant's claim it must appear that the selection was in all respects regular and valid, and entitled the Railway Company to the land selected, and that such selection was followed by approval and patent.

We submit that there would be no room for argument upon this proposition if it were not for certain language found in the opinion of this court in Sjoli v. Dreschel, 199 U. S. 564. And it is not what is *decided* in that case, but what is *said* in the opinion, that is responsible for the doubt which has arisen. In this connection it seems to us that the language of Mr. Justice Harlan (who delivered the opinion in Sjoli v. Dreschel) in the recent case of

Kuhn v. Fairmont Coal Co., 215 U. S. 349, is especially pertinent. The learned Justice said:

> "It has been suggested—and the suggestion cannot be passed without notice—that the views we have expressed herein are not in harmony with some recent utterances of this court, and we are referred to East Central Eureka Min. Co. v. Central Eureka Min. Co., 204 U. S. 266, 272. That case involved, among other questions, the meaning of a deed for mining property. This court, in its opinion, referred to a decision of the state court as to the real object of the deed, and expressed its concurrence with the views of that court. That was quite sufficient to dispose of the case. But in the opinion it was further said: 'The construction and effect of a conveyance between private parties is a matter as to which we follow the court of the state'—Citing Brine v. Hartford F. Ins. Co., 96 U. S. 627, 636; De Vaughn v. Hutchinson, 165 U. S. 566. *Even if the broad language just quoted seems to give some support to the contention of the defendant, it is to be observed that no reference is made in the opinion to the numerous cases,* some of which are above cited, holding that the Federal court is not bound, in cases between citizens of different states, to follow the state decision, if it was rendered after the date of the transaction out of which the rights of the parties arose. *Certainly there was no purpose on the part of the court to overrule or to modify the doctrine of those cases; and the broad language quoted from East Central Eureka Min. Co. v. Central Eureka Min. Co. must therefore be interpreted in the light of the particular cases cited to support the view which that language imports.*"

Let us apply to the interpretation of the opinion in Sjoli v. Dreschel the principles invoked by the court in the foregoing quotation. We may con-

cede that the "broad language" of that opinion supports the contention of complainant in this case, and the decision of the court in the Hoyt and Wass cases, to the effect that the Railway Company's selection, although regular and valid in and of itself, did not bar an entry of the land under the timber and stone act, where application for such entry was made prior to approval of the selection by the Secretary of the Interior. But we submit that under the principles applied in Kuhn v. Fairmont Coal Co. this broad language must be interpreted "in the light of the particular cases cited to support" the decision in Sjoli v. Dreschel, and in the light of the fact that no reference is made in that opinion to the numerous cases holding a contrary doctrine.

Now the case before the court in Sjoli v. Dreschel was that of a homestead claimant who had settled on the land in 1884, prior to any selection or attempted selection thereof by the Railway Company, and who continued to reside thereon, complying with all the requirements of the homestead law, at all times after the date of such settlement. The Railway Company filed its selection list in 1885. After prolonged litigation in the Department the railroad selection was disapproved by the Secretary and patent was issued to Sjoli, the homestead claimant. But the land was included in a withdrawal made by the Secretary some time previous to Sjoli's settlement thereon, in aid of the Railway Company's indemnity rights; and one of the questions in the case was whether that withdrawal, made in advance of selection, prevented the attaching of rights under Sjoli's settlement.

The particular cases cited in Sjoli v. Dreschel fully sustain the point actually decided; but we respectfully submit that not one of them furnishes support for the broad language of the opinion; at least in the application given that language by the Court of Appeals in the Hoyt case and by the Supreme Court of Minnesota in the Wass case.

Hewitt v. Schultz, 180 U. S. 139, Cedar Rapids & Missouri River Railway Co. v. Herring, 110 U. S. 27, Northern Pacific v. Miller, 7 L. D. 100 and Northern Pacific v. Davis, 19 L. D. 87, were all cases involving railroad indemnity selections, where the settlement antedated the selection.

Nelson v. Northern Pacific, 188 U. S. 108, Spicer v. Northern Pacific, 10 L. D. 440, Northern Pacific v. McCrimmon, 12 L. D. 554, and Northern Pacific v. Plumb, 16 L. D. 80, were cases involving land within the place limits of the Northern Pacific grant where settlement was made before definite location of the railroad, and the question was as to the effect of a withdrawal before settlement.

Northern Pacific v. Sanders, 166 U. S. 620, involved lands in the place limits, also, and the question was whether mineral claims, of record at the time of definate location, although afterwards cancelled, operated to except the land from the grant

Menotti v. Dillon, 167 U. S. 703, was another case involving place lands, where the conflict was with a claimant whose rights were initiated before definite location.

United States v. Northern Pacific, 152 U. S. 284, United States v. Oregon & California Railroad, 176

U. S. 28, St. Paul & Pacific v. Northern Pacific, 139 U. S. 1, St. Paul & Sioux City Railroad v. Winona & St. Peter Railroad, 112 U. S. 720, Kansas Pacific v. Atchison, Topeka & Santa Fe, 112 U. S. 414, and Missouri, Kansas & Texas Railway Co. v. Kansas Pacific Railway Co., 97 U. S. 491, are cases involving conflicting railroad grants, in none of which were the rights of individual entrymen considered; and none of these latter cases has any direct bearing upon the particular point now under discussion.

In Grinnell v. Railroad Co., 103 U. S. 739, the decision was in favor of the railroad company, but the court suggests the query whether the claim of the railroad company to selected lands would be superior to an entry made prior to selection.

Wilcox v. Eastern Oregon Land Co., 176 U. S. 51, is another case where the decision was in favor of the railroad company, and there is nothing suggesting a doubt as to the priority of an indemnity selection made previous to adverse entry.

Resser v. Carney, 52 Minn. 397, is a case which applies the well settled principle that no *title* vests under an indemnity selection until approval by the Secretary, and no question of priority is involved.

Musser v. McRae, 38 Minn. 409, is an earlier decision in the case reported under the same title at 44 Minn. 343. The plaintiffs' holding under conveyance from the company, sued to recover for timber cut from land within the indemnity limits of a Wisconsin railroad grant; but on the first trial they made no effort to prove that the land had been selected, or the selection approved, nor did they show

any patent from the United States. The court held that the plaintiffs had failed to prove title sufficient to support an action for trespass; and the language quoted from that case in Sjoli v. Dreschel was used with reference to that omission. All this is explained in the opinion on the second appeal (Musser v. McRae, 44 Minn. 343, which is one of the authorities relied upon in support of our position. On the second trial the missing proof was supplied; and, the date of selection being established, the court held that the patent related back to the date of the filing of the selection list, so as to permit recovery for timber cut from land between the date of selection and the date of the Secretary's approval thereof.

Aside from the fact that none of the authorities cited in Sjoli v. Dreshcel support the broad language of the opinion in the application given it in the Hoyt and Wass cases, we venture the statement, which we put in italics for greater emphasis, that:

Prior to the decision in Sjoli v. Dreschel it was never held or declared by any court or in any decision of the Land Department that the rights acquired under a railroad indemnity selection, properly made, of land then subject to such selection, where that selection was subsequently approved by the Secretary of the Interior in due course, could be defeated by an entry, settlement or other claim initiated after the date of such selection, although before approval thereof.

Nor has it been so held in any case since the de-

cision of Sjoli v. Dreschel, except by the Court of Appeals in the Hoyt case, and by the Supreme Court of Minnesota in the Wass case, and in Houston v. Northern Pacific, 109 Minn. 273,—cases decided by courts which considered themselves bound by the language of the Sjoli case.

In some other cases in this and other courts the language of Sjoli v. Dreschel has been cited or quoted, but in none of these latter cases has it been applied in the sense it is here considered. For instance, Brandon v. Ard, 211 U. S. 11, is an echo of the old case of Ard v. Brandon, 156 U. S. 537, where settlement on the land antedated the inception of the railroad company's rights; and Osborn v. Froyseth, 216 U. S. 571, was a case where, as in Sjoli v. Dreschel, a homestead claimant settled on the land long prior to the first valid selection by the railway company, although in that case there had been an earlier selection adjudged invalid and canceled by the Land Department, upon which it was held no rights could be predicated.

Indeed, if the decision in Osborn v. Froyseth is carefully considered it will be found at least inferential authority for our position. If it were the law that the rights of a claimant settling on the land at any time before approval by the Secretary are superior to rights under an indemnity selection, there would have been no occasion for the discussion and consideration given that case, nor for the marked emphasis put upon the fact that the homestead claimant settled on the land prior to any valid

selection thereof. For in that opinion Mr. Justice Lurton said:

> "The plain effect of the settlement made upon the land here in controversy before any valid selection of the same land by the railroad company, under its grant, was to initiate a homestead right. That settlement and possession continued from the time it was first made, and when, in October, 1891, the Hastings and Dakota Railroad, or its successors in title, attempted to select that land as indemnity land, the land in question was in the actual occupancy of Froyseth claiming it as a homestead. It had, by such settlement, been segregated from the lands subject to selection, and in a contest between such a homesteader and those claiming under selections subsequently made of lieu lands the claim of the former is the better claim. * * * But it is urged that the original selection made May 26, 1883, was valid, and operated to vest the title as of that date in the railroad company. * * * The rejection by the Secretary of the Interior of the selection made in 1883 is fatal to any claim now made to carry back the title of the plaintiff in error to that selection. * * * Thus, if either pre-emption or homestead rights had been initiated before such selection, the parcels to which such right had attached were not subject to appropriation as indemnity lands. * * * But it is urged that the mere fact that there was no record evidence of the homestead claim when the selection of 1891 were made was enough to give efficacy to that selection and vest the legal title under the patents thereafter issued. But this is answered by what we have already said, namely, that if at that date this land was actually occupied by one qualified under the law, who had entered and settled thereon before that time, with the intent to claim it as a homestead, the land had ceased to be public land and as such subject to selection as lieu land."

This case of Osborn v. Froyseth also supplies a sufficient answer to the suggestion that the rule deduced from the broad language of the opinion in Sjoli v. Dreschel was necessary to the decision in that case, for the reason that Sjoli did not file his application to enter the land as a homestead until long subsequent to the selection thereof by the Railway Company, although his settlement thereon preceded such selection. The same conditions existed in Osborn v. Froyseth; and the court points out that "under the act of May 14, 1880, (ch. 89, 21 Stat. 141, sec. 3) the right of one settling in good faith for the purpose of claiming a homestead relates back to the date of settlement"; also that where the land is, at the time of selection, in the occupancy of an actual settler who intends in good faith to claim the land as a homestead, such occupancy removes the land from the category of land subject to indemnity selection; and an attempted selection thereof is ineffectual, without regard to whether the settler subsequently perfects his homestead claim. These propositions are fully sustained by St. Paul, Minneapolis & Manitoba Railway Co. v. Donohue, 210 U. S. 21, 31, which is cited in that connection in Osborn v. Froyseth.

But let us examine some of the numerous cases, to which no reference is made in the opinion in Sjoli v. Dreschel, which announce and apply principles directly contrary to or inconsistent with the

broad language of that opinion as interpreted by the Court in the Hoyt and Wass cases. There is no lack of authorities directly in point. The great cases of Campbell v. Doe, 13 How. 244, Shepley v. Cowan, 91 U. S. 330, and McCreery v. Haskell, 119 U. S. 327, are referred to in Mr. Bunn's brief, and we shall not dwell upon them here at any great length. But there are certain features of those cases which we shall touch upon in passing. Each of those cases declares and applies the familiar doctrine, thus stated by Mr. Justice Field in Shepley v. Cowan:

> "The party who takes the initiatory step in such cases, if followed up to patent, is deemed to have acquired the better right as against others to the premises. The patent which is afterwards issued relates back to the date of the initiatory act, and cuts off all intervening claimants. * * * In all such cases, the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right."

This principle was applied in McCreery v. Haskell to a selection which, in its essential qualities, was precisely like the selection in the case at bar. This was a state selection under a grant to the State of California by an act which provided (10 Stats. 247, Sec. 7):

> "That where any settlement * * * shall be made upon the 16th and 36th sections before the same shall be surveyed, or where such sections may be reserved for public uses, or taken by private claims, other lands shall be selected by the proper authorities of the state in lieu thereof, agreeably to the provi-

> sions of the act of Congress approved on the 20th of May, 1826, entitled 'An Act to appropriate lands for the support of schools in certain townships and fractional townships not before provided for,' *and which shall be subject to approval by the Secretary of the Interior* * * *."

In that case Mr. Justice Field, delivering the unanimous opinion of the court, said:

> "The land * * * was open to settlement with other public lands, and consequent preemption by settlers, and to selections by the State in lieu of the school sections within the confirmed Mexican grant. * * * As between the settler and the State, the party which first commenced the proceedings required to obtain the title, if followed up to the final act of the government for its transfer, is considered as being entitled to the property. *In such cases the rule prevails that the first in time is the first in right* * * * Where, by reason of the loss of the school sections, a selection is made of other lands, the list certified *operates upon the selection as of the day when made and reported to the local land office, and cuts off, as would a patent in such cases, all subsequent claimants.* In the present case, the selection by the authorities of the State of the land in controversy, was made on the 22nd of April, 1868, nearly one year and eight months before the alleged settlement of the plaintiff. *The subsequent approval of the selection by the Secretary of the Interior* and the listing of the land to the State by the Commissioner of the General Land Office, completed the proceedings which *vested the title in the State as of the date of the selection.*"

The cases of Shepley v. Cowan and McCreery v. Haskell have been cited, and the principle that in proceedings for the acquisition of public lands the

first in time is the first in right and that the patent when issued relates back to the initiatory step and cuts off all intervening claimants has been applied, in a vast number of decisions by state and Federal courts and by the Land Department. A few of these cases are cited below.

Sturr v. Beck, 133 U. S. 541, 550.

Hy-Yu-Tse-Mil-Kin v. Smith, 194 U. S. 401, 414.

United States v. Anderson, 194 U. S. 394, 399.

United States v. Detroit Lumber Co., 200 U. S. 321.

Wirth v. Branson, 98 U. S. 118.

Last Chance Mining Co. v. Tyler Mining Co., (C. C. A. 9th Cir.) 61 Fed. 557.

Peyton v. Desmond, (C. C. A. 8th Cir.) 129 Fed. 1, 11.

Waldron v. United States, 143 Fed. 413.

Ison v. Nelson Mining Co., 47 Fed. 199.

Lilienthal v. Southern California R'y. Co., 56 Fed. 701.

Hollowell v. Slauson, 83 Cal. 539, 23 Pac. 692.

Brigham City v. Rich, 34 Utah 130, 97 Pac. 220.

Talbot v. King, 6 Mont. 76, 9 Pac. 434.

Silver Bow Mining & Milling Co. v. Clarke, 5 Mont. 378, 5 Pac. 570.

Benton v. Johncox, 17 Wash. 277, 49 Pac. 495.

Lone Tree Ditch Co. v. Cyclone Ditch Co., 15 S. D. 522, 91 N. W. 352.

Danforth v. Morrical, 84 Ill. 456.

It seems to us that the case of United States v. Anderson, 194 U. S. 394, is absolutely conclusive of the question now under discussion. That was a

case involving a grant to the State of Alabama in aid of railroads, which provided for indemnity selections to be made by the agents of the State, subject to the approval of the Secretary of the Interior. Selections were duly made in 1887, but were rejected by the local officers under an erroneous view of the law. On appeal this action of the local officers was set aside, and in 1896 the selections were approved by the Secretary and the lands certified to the State. During the period which elapsed between the date of selection and the date of the approval by the Secretary, certain persons went upon the land and removed valuable iron ore and lime rock therefrom. The United States brought suit to recover for this trespass, and a compromise was made with the trespassers under which they paid $15,000 to the United States in settlement of the claim for the material removed from the land. Afterwards the persons succeeding to the rights of the State under the selection sued the United States in the Court of Claims and recovered judgment for $15,000. This judgment was affirmed by this court in an opinion by Mr. Justice White, who said:

> "Under these circumstances, the case is one for the application of the fiction of relation, by which, in the interest of justice, *a legal title is held to relate back to the initiatory step for the acquisition of the land.* Many cases illustrating the doctrine in various aspects have been determined in this court. (Citing authorities in foot-note.) Indeed, this case is one coming peculiarly within the principle of relation, as the approval of the selections manifestly imported that at the time of the appli-

> cation for selections the land in question was rightfully claimed by the applicant. * * * Here, as we have seen, the grantee had exercised his right to apply for selections within the indemnity limits and had in legal form requested the approval of the same by the Government. Everything, therefore, which the grantee was required by law to do to obtain the legal title had been performed. These facts bring the case within the principle decided in Heath v. Ross, 12 Johns. 140, and Musser v. McRae, 44 Minn. 343."

Musser v. McRae, 44 Minn., 343, was a case where timber was cut from the selected land by trespassers between the date of a railroad indemnity selection and the date of approval thereof; and it was held that the patent title related back to the date of selection so as to carry the right to recover for the trespass. The court said:

> "Upon the state of facts presented by the record the title acquired by the company under the patent unquestionably inured to the plaintiffs, its grantees, and their further contention is that the title derived from the government under the patent took effect by relation as of the date of the selection of the lands by the company. * * * The deficiency lands selected by the company were such as they were entitled to, and the patent is evidence of the ratification of the selection, and this selection duly certified to the department, may be treated as a lawful application for the confirmation or approval thereof. It was an assertion of their claim to the particular lands, *and, if approved, the title may properly be held to relate back at least to the date of such selection* in order to protect them against trespassers upon the lands."

Musser v. McRae was expressly approved in United States v. Anderson, supra, and was recognized as authority, although distinguished upon the particular facts of that case, in United States v. Loughrey, 172 U. S. 206; where this court said of the decision in Musser v. McRae:

> "It was held that the issuance of a patent to the Railway Company for the lands so selected was evidence that the company had complied with all the conditions of the grant, and was entitled to the lands described therein, and that the title passed from the United States *at the date of the selection*. And it was further held that * * * the patents must be held to relate back to the selection of the lands, so as to save the purchasers to whom the lands had been granted, a right of action for the timber wrongfully removed from the land."

Now it seems to us that the decisions in United States v. Anderson and Musser v. McRae are wholly inconsistent with the idea that no rights attach by virtue of a selection allowed by the local officers, as against a claim initiated after such selection, but before approval thereof by the Secretary of the Interior. If such approval, and the patent issued in consequence thereof, relate back to the date of selection so as to enable the selector to recover the value of timber taken from the land before such approval, and to recover from the Government itself money collected by it in settlement of a claim for similar trespasses, how can it be held that the approval and patent do not relate back to the date of selection and cut off claims subsequently initiated? Surely there is the stronger

reason for the application of the doctrine of relation in the latter case. Indeed, it is for the purpose of cutting off intervening claims that the doctrine is most commonly invoked.

In the leading case of Stark v. Starrs, 6 Wall. 402, Mr. Justice Field said:

> "When in fact the patent does issue, it relates back to the inception of the right of the patentee, *so far as it may be necessary to cut off intervening claimants.*"

In Smelting Co. v. Kemp, 104 U. S. 647, the same great judge said.

> "This doctrine as to the conclusiveness of a patent is not inconsistent with the right of the patentee, often recognized by this court, to show the date of the original proceeding for the acquisition of the title, where it is not stated in the instrument, as the patent is deemed to take effect by relation as of that date, *so far as it is necessary to cut off intervening adverse claims.*"

In Heydenfeldt v. Daney Gold Min. Co., 93 U. S. 634, it was said:

> "The patent subsequently obtained from the United States relates back to the time of the original location and entry, and perfects their right *to the exclusion of all adverse intervening claims.*"

Peyton v. Desmond, 129 Fed. 1, 11, was a case similar to United States v. Anderson and Musser v. McRae, except that it was a homestead settler who was there permitted to recover for timber cut from the land before his settlement claim had ripened into an equitable title. And Mr. Justice Van De-

vanter, speaking for the Court of Appeals, said:

> "While the doctrine of relation is of equitable origin, it has a well-recognized application to proceedings at law. By it 'is meant that principle by which an act done at one time is considered, by a fiction of law, to have been done at some antecedent period. It is usually applied where several proceedings are essential to complete a particular transaction, such as a conveyance or deed. The last proceeding which consummates the conveyance is held, for certain purposes, to take effect by relation as of the day when the first proceeding was had.' Gibson v. Chouteau, 13 Wall. 92. * * * The doctrine is also applied to public land transactions, when, to give effect to the intent of the statute *or to cut off intervening claimants*, the patent is deemed to relate back to the initiatory act. Ross v. Barland, 1 Pet. 655, 664; Landes v. Brant, 10 How. 348, 372; Lessee of French v. Spencer, 21 How. 228, 240; Beard v. Federy, 3 Wall. 478, 491; Grisar v. McDowell, 6 Wall. 363, 380; Stark v. Starr, 6 Wall. 402, 418; Lynch v. Bernal, 9 Wall. 315, 325; Shepley v. Cowan, 91 U. S. 330, 337, 340; Weeks v. Bridgman, 159 U. S. 541, 546; United States v. Loughrey, 172 U. S. 206, 218, 219, 225-231. Thus it was said in Shepley v. Cowan: 'The party who takes the initiatory step in such cases, if followed up to patent, is deemed to have acquired the better right, as against others, to the premises. The patent which is afterwards issued relates back to the date of the initiatory act, *and cuts off all intervening claimants*. Thus the patent upon a state selection takes effect as of the time when the selection is made and reported to the land office, and the patent upon a pre-emption settlement takes effect from the time of the settlement, as disclosed in the declaratory statement or proofs of the settler to the register of the local land office.' Other applications of the doctrine will be found in Cothrin v. Faber,

68 Cal. 39; Jackson v. Bull, 1 Johns. Cas. 81; Jackson v. Ramsey, 3 Cow. 75; Heath v. Ross, 12 Johns. 146; St. Onge v. Day, 11 Colo. 368; Musser v. McRae, 44 Minn. 343."

The following language from the Eureka Case, 4 Sawy. 317, is quoted with approval in Silver Bow Mining & Milling Co. v. Clark, 5 Mont. 378, 5 Pac. 570:

> "Each patent is evidence of a perfected right in the patentee to the claim conveyed, the initiatory step for the acquisition of which was the original location. * * * The patent will take effect by relation as of that date, *so far as may be necessary to cut off all intervening claimants.* * * * As, in the system established for the alienation of the public lands, the patent is the consummation of a series of acts having for their object the acquisition of the title, the general rule is to give to it an operation by relation at the date of the initiatory step, so far as may be necessary to protect the patentee against subsequent claimants to the same property."

And in this connection the language already quoted above from McCreery v. Haskell is especially pertinent.

In addition to the authorities already cited, the following cases further support the principle that the doctrine of relation will be applied for the purpose of cutting off claims attaching after the initial step in the proceedings which culminate in patent:

Irvine v. Sims, 3 Dall. 425.

Ross v. Barland, 1 Pet. 655.

Beard v. Federy, 3 Wall. 478.

Weeks v. Bridgeman, 159 U. S. 541.

Patterson v. Tatum, 3 Sawy. 164.

Pacific Coast Mining & Milling Co. v. Spargo, 16 Fed. 348.

Klein v. Argenbright, 26 Iowa, 493.

Cothrin v. Faber, 68 Cal. 39, 4 Pac. 940.

St. Onge v. Day, 11 Colo. 368, 18 Pac. 278.

Faull v. Cooke, 19 Ore. 455, 26 Pac. 662.

Lockwitz v. Larson, 16 Utah, 275, 52 Pac. 279.

Washington Rock Co. v. Young, 29 Utah, 108, 80 Pac. 382.

Page v. Crowley, 83 Minn. 314.

The basic principle which from the beginning has controlled the disposition of the public lands is that, as between conflicting claimants, the first in time is first in right, and that the patent relates back to the date of the initial step lawfully taken by the patentee, or his predecessors in interest, looking towards the acquisition of the land under the law providing for disposal of the same. This principle has been expressly declared in hundreds of cases, but few of which are cited in this brief, and in a still greater number of decisions it has been tacitly recognized and has controlled the determination of the court, although not referred to in terms. And all those cases are but applications of a fundamental rule which runs through the whole fabric of the public land law, and which controls, in some degree, the determination of practically every case where two or more parties claim

the same tract of land. There is no principle of law having relation to the disposal of the public lands and to land titles in general which is so well settled or which has had such widespread and long-continued application. And there is surely none whose reversal or modification would so complicate and disturb the administration of the public lands and the security of titles.

In the course of a somewhat extensive experience in public land questions, and after a most exhaustive search among the authorities bearing upon this particular question, we have not learned of a single case in which this principle has been denied, or which gives authority for the conclusion adopted in the Hoyt and Wass cases—except as such intent may be imputed to the language of the opinion in Sjoli v. Dreschel.

That principle has been applied to entries and claims of every character, and as to no class of claims has it been denied or disregarded. And always the date that fixes priority is held to be the date of the initial step taken under the law, whether that first step be settlement on the land, the filing of a declaratory statement or application to enter or purchase, the deposit of a land warrant or other certificate, or the filing of a selection list or application to select. And it is always the date of settlement or of the filing of the application or other paper in the local land office that fixes the right, regardless of the date when action is taken thereon by the local land officers, the Commissioner of the General Land Office, or the Secretary of the In-

terior. In no case that we have found has the attaching of the claimant's rights, as a matter of priority over other claims, been postponed to the date when action was taken on his claim or selection by the officers of the Land Department, if the initial step was lawfully taken and the land was then subject to such appropriation.

We have selected for the information of the court a few of the numerous cases illustrating the application of this principle to different classes of claims; indicating, in each case, the character of the entry and the date from which the claim was held to have priority.

Preemption entry: from date of settlement on land, where that act preceded the filing of the declaratory statement:

Johnson v. Towsley, 13 Wall. 72.

Shepley v. Cowan, 91 U. S. 330.

Lilienthal v. Southern California Ry Co., 56 Fed. 701.

Lone Tree Ditch Co. v. Cyclone Ditch Co., 15 S. D. 522, 91 N. W. 352.

Preemption entry: from date of filing the declaratory statement, where that act preceded settlement:

St. Onge v. Day, 11 Colo. 368, 18 Pac. 278.

Homestead entry: from date of settlement, where that act preceded the filing of application to enter.

Ard v. Brandon, 156 U. S. 537.

Osborn v. Froyseth, 216 U. S. 571.

Faull v. Cooke, 19 Ore. 455, 26 Pac. 662.

Homestead entry: from date of filing application to enter, where that act preceded settlement.

Sturr v. Beck, 133 U. S. 541.

Peyton v. Desmond, 129 Fed. 1.

Timber and stone entry: from date of filing application.

St. Paul, M. & M. Ry. Co. v. Donohue, 210 U. S. 21.

State selection under quantity grant: from date of filing application to select in local land office.

Ison v. Nelson Mining Co., 47 Fed. 199.

Patterson v. Tatum, 3 Sawy. 164.

Brigham City v. Rich, 34 Utah 130, 97 Pac. 220.

State selection of indemnity lands: from date of filing application to select in local land office.

McCreery v. Haskell, 119 U. S. 327.

Howell v. Slauson, 83 Cal. 539, 23 Pac. 692.

Mining claim: from the date of location.

Heydenfelt v. Daney Gold Min. Co., 93 U. S. 634.

Last Chance Min. Co. v. Tyler Min. Co., 61 Fed. 557.

Talbot v. King, 6 Mont. 76, 9 Pac. 434.

Silver Bow Mining & Milling Co. v. Clarke, 5 Mont. 378, 5 Pac. 570.

Indian allotment: from date of application for allotment or date of settlement.

Waldron v. United States, 143 Fed. 413.

Hy-Yu-Tse-Mil-Kin v. Smith, 194 U. S. 401.

Spanish or Mexican grant: from date of filing application for confirmation.

Ross v. Barland, 1 Pet. 655.

Landes v. Brant, 10 How. 348.

Beard v. Federy, 3 Wall. 478.

Lynch v. Bernal, 9 Wall. 315.

Military bounty land warrants: from date of location by filing in local land office.

Wirth v. Branson, 98 U. S. 118.

Klein v. Argenbright, 26 Iowa, 493.

Lieu selection under the exchange provisions of the so-called "Forest Reserve Lieu Selection Act" of June 4, 1897: from date of filing application to select in local land office.

Clarke v. Northern Pacific, 30 L. D. 145.

Gideon F. McDonald, 30 L. D. 124.

Kern Oil Co. v. Clarke, 30 L. D. 550.

Lieu selection under the exchange provisions of the act of March 2, 1899, establishing the Mt. Rainier National Park: from date of filing application to select in local land office.

Ferguson v. Northern Pacific, 33 L. D. 634.

Swanson v. Northern Pacific, 37 L. D. 74.

State of Idaho v. Northern Pacific, 37 L. D. 70.

Lieu selection under act of July 1, 1898, for the adjustment of conflicting claims under the Northern Pacific grant: from date of filing application to select in local land office.

Northern Pacific v. Mann, 33 L. D. 621.

Soldier's additional homestead: from date of filing application to enter in local land office.

Oliver v. Thomas, 5 L. D. 289.

As between two railroad companies whose indemnity limits overlap "priority of selection secures priority of right," and the priority depends on the date of filing the selection list.

St. Paul & Sioux City Railroad v. Winona & St. Peter Railroad, 112 U. S. 720.

There is nothing whatever in such decisions as Wisconsin Central v. Price County, 133 U. S. 496, Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 301, Humbird v. Avery, 195 U. S. 480, and Oregon & California Railroad Co. v. United States, 189 U. S. 103 and 116, (and there are many cases of the same general character) which is in any respect inconsistent with the doctrine we invoke. In each of those cases it is held that approval by the Secretary of the Interior is necessary to convert a railroad indemnity selection into an estate or interest entitled to recognition *as against the United States*, or into an equitable title which can be used as a basis for proceedings in which *ownership* of the land is an essential prerequisite.

There is a clear distinction between acts necessary to establish an equitable title or vested interest in the land as against the Government, and acts necessary to secure priority over an adverse claimant under the public land laws. It may be

admitted that until approval of an indemnity selection the selector has no rights as against the United States; and that until such approval it is competent for the Government to deal with or dispose of the land as it sees fit. But this is a very different thing from saying that the act of selection, when followed up by approval, gives no rights or priority over an individual who attempts to initiate a claim to the land subsequent to such selection, but prior to the approval thereof.

Under practically every method by which public lands are acquired, and especially in the case of entries under the preemption law, the homestead law, and the timber and stone act, there is an initial step—settlement on the land, or the filing in the local land office of a declaratory statement or application to enter—which fixes priorities as between the applicant and a possible adverse claimant, but which confers no vested right as against the Government. It is settled by numerous decisions that until the preemptioner or timber and stone applicant has completed his entry by final proof and payment, and until the homesteader has earned the land by full complaince with the requirements of the homestead law, the Government may dispose of the land as it sees fit, and the claimant has no standing to complain of any such disposition.

Frisbie v. Whitney, 9 Wall. 187.

The Yosemite Valley Case, 15 Wall. 77.

Consequently the fact that an indemnity selection does not, prior to approval, create a right or interest effective against the Government, or vest in the company an estate which is subject to taxation or an equitable title which will support an action dependent upon ownership, has no bearing on the question whether such selection, if otherwise valid, has priority over a claim subsequently initiated under the homestead law or the timber and stone act. This distinction was recognized in Cosmos Exploration Co. v. Gray Eagle Oil Co., supra, where it was held that a lieu selection under the act of June 4, 1897, did not vest an equitable title in the selector until approval of such selection by the Secretary. After so declaring, Justice Peckham said:

> "It may be that when the decision of the Land Department is made, if it be favorable to the applicant, the complete equitable title claimed will accrue *from the time the selection of the lands was made in the local land office*, and when the patent subsequently issues the legal title *will rest from the time of selection*."

And in the course of the opinion in Oregon & California Railroad Co. v. United States, supra, Mr. Justice Harlan said:

> "The rule is otherwise as to lands within indemnity limits. As to lands of the latter class the Company *acquires no interest* in any specific sections until a selection is made with the approval of the Land Department; *and then its right relates to the date of the selection*."

The Supreme Court of Missouri in Hammond v. Johnston, 93 Mo. 198, 6 S. W. 83, recognized this distinction as applied to selections under the New Madrid Act, saying:

> "It is true, beyond all doubt, that as between Easton and those claiming under him on the one hand, and the United States on the other, there was no vested right in Easton and those claiming under him, as against the United States, until the surveyor returned the plat to the recorder of land titles, which was not done until 1833. *But as between Easton and third persons, he did acquire a priority* and a right which the courts respect and uphold and enforce.

In some of the arguments in this case much emphasis has been laid upon the provision in the granting act to the effect that indemnity selections shall be made "subject to the approval of the Secretary of the Interior," or "under the direction of the Secretary of the Interior"; but these provisions do not affect the question of priority. They are very material in determining whether any right is secured by the Railway Company, *as against the United States*, by the mere filing of its list of selections. But as explained above, this is something entirely distinct and different from the question of priorities as between individual claimants. Until the selection has been passed upon and approved by the Secretary, it has no standing as against the Government; but when the selection has been examined and found to be legal and valid, and the required approval has been given, that approval relates back to and takes effect from the date of the

filing of the selection list in the local office, as against claims asserted by an individual whose alleged rights have had their inception in the interim.

In passing upon such selections the Secretary acts in a judicial or quasi-judicial capacity. His discretion to approve or disapprove the selections is not arbitrary and unrestrained, but must be exercised in a reasonable and judicial manner. If the land is free from adverse claims and is such as the Company is entitled to select, if a deficiency exists for which the Company is entitled to indemity, and if the selection and the proceedings connected therewith are in all respects regular and in accordance with the law and departmental regulations, then it is the duty of the Secretary to approve such selection.

In McHenry v. Nygard, 72 Minn. 2, Judge Mitchell said:

> "Although the selection of the lieu lands was to be made under the direction of the Secretary of the Interior, they were to be selected by the railroad company, and not by the Secretary. If the company was entitled to select the land, and did so in conformity with all the requirements of law, the officers of the Land Department had no authority arbitrarily to refuse to recognize and approve the selection. The rights of the Company under its selection became fixed and vested notwithstanding such rejection and refusal."

In Jones v. Northern Pacific, 34 L. D. 105, 110, the Secretary said:

> "That the right of selection conferred by these acts cannot be restricted by the Secretary of the Interior seems clear. His duty in the premises is to supervise the administration of the grant, but this authority does not permit him to abridge or enlarge the laws of Congress. He should see that the selections made in satisfaction of the grant are confined to the lands described in the granting act, but as between different sections equally within the description contained therein, he cannot say which may or which may not be selected, for in so doing he would be denying the railroad company the right to make the selection."

In Willamette Valley and Cascade Wagon Road Co. v. Bruner, 26 L. D. 356, it was said:

> "The right of selection conferred by the granting act cannot be restricted or limited by the Secretary of the Interior. It is his duty to supervise the administration of this grant but his authority does not permit him to revise or limit the laws of Congress. He is as much bound by the provisions of the granting act as is either of the claimants in this case. It is the duty of the Secretary to see that the selections made in satisfaction of the grant are confined to lands described in the granting act. * * * * The supervisory authority of the Secretary is not unlimited and cannot be exercised arbitrarily for the purpose of conferring rights upon one person to the detriment of the acknowledged rights of others; Cornelius v. Kessel, 128 U. S. 456."

See also:

Sage v. Swenson, 65 Minn. 517.

Southern Pacific v. Wiggs, 43 Fed. 333.

St. Paul & Sioux City v. Winona & St. Peter, 112 U. S. 720.

Insofar as a distinction may be drawn between an act which provides that selections thereunder shall be "subject to the approval" of the Secretary, and one which provides that selections shall be made "under the direction" of the Secretary, the distinction is favorable to selections under a provision of the latter sort. It has been well said that a selection is made "under the direction" of the Secretary, when it is made pursuant to general regulations or instructions promulgated by him; whereas, where the statute expressly requires his "approval," an affirmative approval of the specific selections is necessary to vest title thereunder.

In Southern Pac. R. Co. v. Wiggs, 43 Fed. 333, Judge Sawyer said:

> "Although the selection of the lieu lands were to be 'made under the direction of the Secretary of the Interior,' they were to be 'selected by said company,' not by him; nor was the selection required to be approved by him as is required by some other acts. And when there was a deficiency, and the company selected lands open to selection, there was no authority vested in the Secretary to arbitrarily refuse to recognize and allow such selection. This would deprive the company of the right of selection expressly given by the statute, and vest it in the Secretary."

But the case at bar has been argued and is submitted on the theory that the same rules apply against the selection under which defendants derive title, that would apply if the act provided that selections thereunder should be made "subject to the approval" of the Secretary.

There is another matter which is entitled to the greatest possible weight in the consideration of this question; and that is the fact that from the beginning the Land Department has uniformly held that no rights can be acquired by an entry made subsequent to a valid railroad indemnity selection, although prior to the approval of such selection. Never for a moment has there been a departure from the rule that the date of actual selection (which is interpreted to mean the date the selection list is filed in the local office), regardless of the date of approval, determines the rights of the company as against adverse claimants; and the Department has steadfastly refused to recognize claims initiated after that date, where the original selection is found to be regular and valid.

Under the familiar doctrine already referred to in this brief in another connection, where the authorities are cited, this long and uniform course of decision of the Land Department should be given great respect by this Court, and should not be overruled or departed from except for the most cogent reasons, nor unless it is plain beyond doubt that the rule of law thus established is erroneous and unreasonable.

Now we respectfully submit that the rule is neither erroneous nor unreasonable; but that on the contrary it is right, in principle and upon authority, and that it ought to be sustained by this Court, on its merits and quite independently of the weight to which the decisions of the Land Department are

entitled as decisions of the department charged with the duty of executing the statutes thus construed. We submit that the rule is a rule of practical justice and is conducive to orderly administration; and that a contrary rule would create disturbance and disorder and would serve no good or useful purpose.

Such a rule is consistent with the principles which control the practice of the Department under all the various laws for the disposition of the public domain—it is a rule of necessity, without which an orderly administration would be impossible—and there is no fair reason for distinguishing a railroad indemnity selection from any form of acquisition of public land.

Every method by which public land may be acquired under the law necessarily involves, first, the act by which the claimant indicates his desire to appropriate specific land, and next, a determination by the Department that he is entitled to take that particular land. Obviously the assertion of the claim must precede the determination by the Department, and in the ordinary course of administration considerable time must often elapse before the determination can be made. In no class of cases is delay so likely to occur as in the consideration of railroad indemnity selections, where the Department must determine not only whether the land selected is such as the company is entitled to receive, but also whether the loss for which indemnity is claimed furnishes proper ground for such selection; and rarely, if ever, is the delay chargeable to

neglect or omission of the company.

It has uniformly been held, from the beginning, that a claimant who has fully complied with the law on his part cannot be prejudiced by delay in passing upon his claim, and that no claim subsequently initiated will be permitted to defeat his rights; but when his entry has been passed upon by the Department the patent issued to him relates back to the date of the first lawful assertion of his right and cuts off all intervening claims.

Now what just reason can there be for applying a different rule in the case of railroad indemnity selections? If the company is entitled to the land under its granting act, if the land is free from other claims at the time of selection, and if the selection is properly made in accordance with the regulations and practice of the Department, why should the company suffer from delay of the Department in passing upon the selection, and why should the company be deprived of its rights in favor of a speculator who seeks to enter the land with full knowledge of the company's prior selection? We repeat that such a rule, in practical operation, will be subversive of good administration and will work injustice and disorder and create uncertainty, and that it will serve no good or useful purpose.

We cite below some of the numerous cases in which the Land Department, both before and since the case of Sjoli v. Dreschel was decided, has applied the doctrine that a valid railroad indemnity selection has priority over any claim based on set-

tlement or entry initiated or offered after the date of selection although prior to the approval thereof by the Secretary of the Interior.

In collecting these cases we confined our search to decisions rendered during the past fifteen years, and, therefore, since it was established that an executive withdrawal of lands within indemnity limits, in aid of the railway company's right of selection, is unauthorized and void. Many of these decisions were handed down while Mr. Justice Van Devanter was Assistant Attorney General, and the opinion in each of those cases is initialled in a manner which indicates that it was approved, if not prepared, by him. In every case cited below the railroad indemnity selecton was sustained as against a claim initiated after selection, but prior to approval by the Secretary, on the ground of the priority of the indemnity selection, and not upon the ground of an infirmity in the subsequent claim, other than the effect upon such claim of the pendency of the prior selection. Some of the decisions were interlocutory in their nature, but in those cases the paramount priority of the indemnity selection was none the less clearly recognized.

Northern Pacific v. Richards, 22 L. D. 99.

O'Brien v. Northern Pacific, 22 L. D. 135.

St. Paul, Minneapolis & Manitoba v. Lambeck, 22 L. D. 202, 23 L. D. 552, 26 L. D. 429.

South and North Alabama Railroad Co. v. Hall, 22 L. D. 273.

Garrett v. Southern Pacific, 22 L. D. 373.

Romaine v. Northern Pacific, 22 L. D. 662.

Northern Pacific v. Lamb, 23 L. D. 1.

Northern Pacific v. Owen, 23 L. D. 324.

Gamble v Northern Pacific, 23 L. D. 351.

Grinnell v. Southern Pacific, 23 L. D. 489.

Brown v. Northern Pacific, 24 L. D. 370.

Northern Pacific v. Fiebiger, 24 L. D. 375.

Northern Pacific v. Shepherdson, 24 L. D. 417.

Page v Northern Pacific, 24 L. D. 444.

Northern Pacific v. Grimes, 24 L. D. 452.

Chicago, Rock Island & Pacific v. Wagner, 25 L. D. 458.

Hagen v. Northern Pacific, 26 L. D. 312.

Tubbs v. Northern Pacific, 27 L. D. 86.

Kauffman v. Northern Pacific, 27 L. D. 133.

Scanlon v. New Orleans Pacific Railway Co., 27 L. D. 274.

Drew v. Northern Pacific, 27 L. D. 310.

Hanson v. Roneson, 27 L. D. 382.

Dunnigan v. Northern Pacific, 27 L. D. 467.

Southern Pacific v. Cherry, 27 L. D. 470.

Northern Pacific v Wolfe, 28 L D. 298.

Oregon and California Railroad Co. v.. Crewdson, 29 L D. 440.

Oregon and California Railroad Co. v. Johnston, 29 L. D. 442.

Northern Pacific v. Smith, 31 L. D. 151.

Eaton v. Northern Pacific, 33 L. D. 426.

Jones v. Northern Pacific, 34 L. D. 105.

Ferguson v. Northern Pacific, 37 L. D. 260.

Santa Fe Pacific v. Northern Pacific, 37 L. D. 593.

Santa Fe Pacific v. Northern Pacific, 37 L. D. 669.

It will be apparent, upon a moment's reflection, that a vast quantity of land has been disposed of and patented in accordance with this principle. Decisions of the Secretary of the Interior are like decisions of a court of last resort, and control the action of the Department and its subordinate officials in similar cases subsequently arising. When a rule of law is once declared and established by decisions of the Secretary, it ceases to be a subject of debate in departmental litigation. Only the exceptional case reaches the Secretary on appeal. Most cases involving well established principles are finally disposed of by the local officers or by the Commissioner. And the fact that so many cases illustrating the principle that a railroad indemnity selection has priority from the date of filing the selection list have come before the Secretary, indicates that an infinitely greater number of such cases have been disposed of on that principle by the subordinate officials of the Department.

We respectfuly submit that a decision of this court which establishes a different rule of priority in such cases will unsettle a vast number of titles throughout the public land states, and will tend to encourage a great deal of undesirable litigation. And it is common knowledge that most of the land patented to railway companies under the indemnity provisions of the various railroad grants, is now in private ownership.

V.

THE PATENT MUST BE TREATED AS A CONCLUSIVE ADJUDICATION OF ALL QUESTIONS OF FACT OR OF MIXED LAW AND FACT AS TO THE RIGHT OF THE RAILWAY COMPANY TO THE LAND, AND THIS FORECLOSES MOST OF THE OBJECTIONS URGED BY COMPLAINANT AGAINST THE VALIDITY OF THE SELECTION.

The issuance of patent implies and includes an adjudication by a quasi-judicial tribunal, conclusive as to all questions of fact necessarily involved in the determination that the patentee is entitled to the land. Where, as in this case, the land conveyed by the patent is land within the jurisdiction of the Department, the patent is impervious to collateral attack, or to attack in an action at law, upon any ground; and it can only be attacked in equity upon the ground of fraud, plain mistake or palpable error of law. The courts will not, in any form of action, undertake to review any question of fact involved in the determination which the issuance of patent implies. All this is familiar doctrine, and it is unnecessary to cite authorities in its support. But the rule is the same where the adjudication which the patent implies involves questions of *mixed law and fact*.

In Marquez v. Frisbie, 101 U. S. 473, 476, Mr. Justice Miller said:

> "The language of this court in Moore v. Robbins, 96 U. S. 530, 535, cited above, is that equity will interfere 'when it is *clear* (italics

> by the court) that these officers have, by a mistake of the law, given to one man the land which, on the undisputed facts, belonged to another.' This means, and it is a sound principle, that where there is a *mixed question of law and of fact*, and the court cannot so separate it as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive."

To the same effect are:

> Green v. Hayes, 70 Cal. 276, 11 Pac. 716.
>
> Wiseman v. Eastman, 21 Wash. 163, 57 Pac. 398, 401.
>
> Cook v. McCord, 9 Okla. 200, 60 Pac. 497, 500.
>
> Estes v. Timmons, 12 Okla. 537, 73 Pac. 303, 305.
>
> Bates & Guild Co. v. Payne, 194 U. S. 106, 109.

Now it seems to us that many of the objections which complainant urges against the validity of the original selection by the Railway Company involve questions of mixed law and fact, as to which the judgment of the department is conclusive under the rule referred to. This is obviously true of the proposition that the selection was invalid because there were other lands open to selection, as to which the Railway Company was required to exhaust its right before resorting to the land in controversy; such as land within the first indemnity limits and land nearer to the tract which was the basis for the particular selection. It is also true of certain of the objections based upon supposed irregularities in the selection lists and the proceedings thereon,

and upon an alleged want of authority on the part of the representatives of the Railway Company making the selection.

And we think it is likewise true of the objection that the Northern Pacific Rail*way* Company did not lawfully succeed to the land and land grant rights of the Northern Pacific Rail*road* Company. It seems very plain to us that this question involves an issue of fact as well as an issue of law, and that upon the record in this case those issues cannot be separated so as to resolve the question into one of pure law, within the rule of Marquez v. Frisbie, supra.

FRANK B. KELLOGG,
STILES W. BURR,
OF COUNSEL FOR APPELLEES.

JAN 12 1910
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States

OCTOBER TERM, 1908.

FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD,

Appellants,

vs.

HERBERT H. HOYT.

No. 195. 24

CHARLES D. CAMPBELL,

Appellant,

vs.

FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD.

No. 176. 12

NORTHERN PACIFIC RAILWAY COMPANY,

Plaintiff in Error,

vs.

FRED WASS and PAULINE WASS.

No. 397. 181

BRIEF FOR APPELLANTS IN No. 195, APPELLEE IN No. 176 AND PLAINTIFF IN ERROR IN No. 397.

CHARLES W. BUNN.

Supreme Court of the United States

OCTOBER TERM, 1908.

FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD,

Appellants,

vs.

HERBERT H. HOYT.

No. 195.

CHARLES D. CAMPBELL,

Appellant,

vs.

FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD.

No. 176.

NORTHERN PACIFIC RAILWAY COMPANY,

Plaintiff in Error,

vs.

FRED WASS and PAULINE WASS.

No. 397.

STATEMENT OF FACTS.

The three cases above entitled are so far alike that they will be discussed in one brief. The Hoyt and Campbell cases are appeals from the United States Circuit Court of Appeals for the Eighth Circuit (re-

ported below 161 Fed. Rep. pp. 324 and 332 respectively). The Wass case is a writ of error to the Supreme Court of Minnesota. The decision of that court followed the decision of the Circuit Court of Appeals in the Hoyt case and is reported 104 Minn. 411. Hoyt claims forty acres and Campbell one hundred and sixty acres of land in Minnesota under the timber and stone law and Wass claims one hundred and sixty acres of land in the same state under the homestead law. Weyerhaeuser and Humbird are purchasers from the Northern Pacific Railway Company. They claim the lands involved in the Hoyt and Campbell cases under the acts of Congress making grants to the Northern Pacific Railroad Company; and the Northern Pacific claims the land involved in the Wass case under the grants made to the Territory of Minnesota by the act of Congress approved March 3, 1857 (11 Stat. 195) and the act of Congress approved March 3, 1865 (13 Stat. 526) as amended by the act of Congress of March 3, 1871 (16 Stat. 588). All three parcels of land were by the land department of the United States decided to belong to the railroad grants and patent for each parcel was issued and delivered to the Railway Company. The Hoyt and Campbell cases are bills in equity; in the Hoyt case the prayer is to charge Weyerhaeuser and Humbird as trustees of the legal title and to compel them to convey, whilst in the Campbell case alternate relief is also prayed, namely, that the patent be can-

celed so as to leave title in the United States open to plaintiff's application to purchase. The Wass case is an action at law of ejectment brought by the Railway Company against Wass to recover possession of the premises. In the Hoyt and Campbell cases the record shows over $2,000 to be involved in each suit.

We can best explain the facts to the court by stating the Hoyt case and differentiating the Campbell and Wass cases. The following statement of facts in the Hoyt case applies to all the cases except as otherwise specified, and our references to the record are, except where otherwise stated, to the transcript in the Hoyt case.

Hoyt asserts that his grantor entered the land under the timber and stone law, which provides for a cash purchase and does not require settlement, and that the United States illegally denied his entry and patented the land to the Northern Pacific Railway Company (successor of the Northern Pacific Railroad Company) which conveyed to Weyerhaeuser and Humbird.

The land lies in Minnesota within what is known as the "second indemnity limits" of the Northern Pacific Railroad Company. Let us explain what the "second indemnity limits" are:

Sec. 3 of the Northern Pacific Railroad charter of July 2, 1864, says:

> "*And be it further enacted*, that there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the

purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections * * *"

This law granted *in the states* the odd sections in a strip of country forty miles in width (twenty on each side of the railroad), which strip of country is called the "place limits," or "granted limits."

It established on each side of the place limits an indemnity belt ten miles in width, within which might be made good by selection lands lost to the company

in the place limits. It says, "other lands shall be selected by the company in lieu thereof, *under the direction of the secretary of the interior,* in alternate sections and designated by odd numbers." This language creates what are called the "first indemnity limits."

Under this act place land losses, wherever occurring, were to be made good *anywhere* within the indemnity belt, regardless of state or territorial lines. And it is admitted law that the losses so to be made good include place lands reserved or disposed of by the United States, or covered by claims, *either before or after the passage of the act,* down to the date of definite location of the railroad.

By the joint resolution of May 31, 1870, amending the Northern Pacific grant of 1864, it is provided:

> "And in the event of there not being in any state or territory, in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such state or territory, within ten miles on each side of said road beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of lands that have been granted, sold, reserved, occupied by homestead

> settlers, preempted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four * * *"

This resolution established "second indemnity limits," viz., two strips of land each ten miles wide, one lying on each side of the road outside the "first indemnity limits." The second indemnity region is unlike the first in this: (a) it can be resorted to only for losses *in the same state or territory;* and (b) only for losses occurring *after* the act of July 2, 1864, and prior to definite location.

The title of the Railroad Company to indemnity lands within either indemnity "limit" rests upon *selection approved by the Secretary of the Interior. Humbird v. Avery,* 195 U. S. 480.

The land in suit was selected by the Railroad Company October 17, 1883. The selection list specified losses in bulk, *i. e.,* it stated the losses by specific descriptions and the selections by specific descriptions, each footing up the same number of acres; but it did not assign each selection to a particular loss. At the time the list was filed it conformed in this respect to the rule of the department. The list was received by the Register and Receiver and transmitted to the general land office. April 11, 1893, the Railroad Company, acting under direction of the Secretary of the Interior, rearranged the selection list so as to specify a particular tract lost as the basis for each

selection. In the rearranged list there was set opposite the tract in controversy in the Hoyt case the NW¼ of NE¼ of section 11, township 46 north, range 16 west, in Minnesota. The last described land was the land lost furnishing the basis of the selection and it was within the *place* limits of the Northern Pacific grant, but also in the indemnity limits of the grant to the State of Minnesota for the Lake Superior and Mississippi Company (act of May 5, 1864), and had been selected by and was approved for patent to the State March 26, 1868.

The record is quite voluminous but most of the material facts are set forth in the opinion of the Secretary of the Interior deciding *Jones v. Northern Pacific* (the identical case of Hoyt now here). This opinion is set forth as an exhibit to Hoyt's complaint. (Transcript pp. 33-41.)

The Hoyt and Campbell cases could not have arisen but for the mistake of law of the land department of the United States in holding that the eastern terminus of the Northern Pacific grant was at Duluth instead of at Ashland as asserted by the Railroad Company. This mistake was corrected and the eastern terminus decided to be at Ashland in *Doherty v. Northern Pacific Railway Company*, 177 U. S. 421, and *United States v. Northern Pacific Railroad Company*, id. 435. The lands involved in both the Hoyt and Campbell

cases lie in Minnesota but opposite to that part of the Northern Pacific road east of Duluth. See maps opposite.

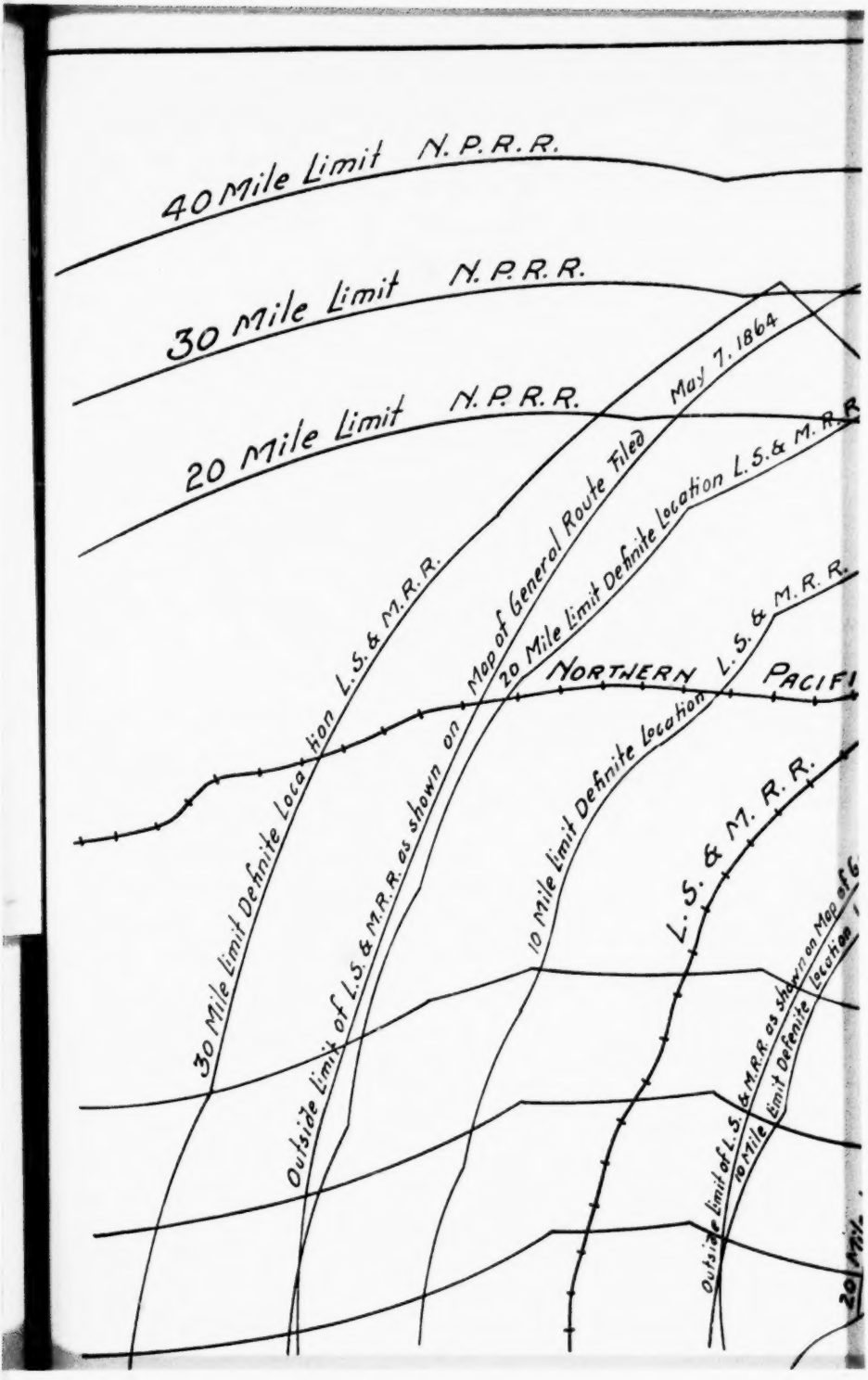
Pursuant to the Secretary's decision of August 27, 1896 (23 L. D. 204) holding that the grant terminated at Duluth, the Hoyt and Campbell selections were canceled March 22, 1897, but only because east of Duluth. After the decisions of this court above cited they were reinstated. Between the cancellation of the selections and before they were reinstated, to-wit, on December 17, 1897, Richard B. Jones filed his application as below stated and made his final proof on the 10th of December, 1898. But before the date last named the land was withdrawn from all entry by virtue of the departmental order of February 28, 1898 (26 L. D. 265) which order was made to preserve the selections and the *status quo* until this court should decide the then pending cases above referred to (Transcript pp. 33, 34).

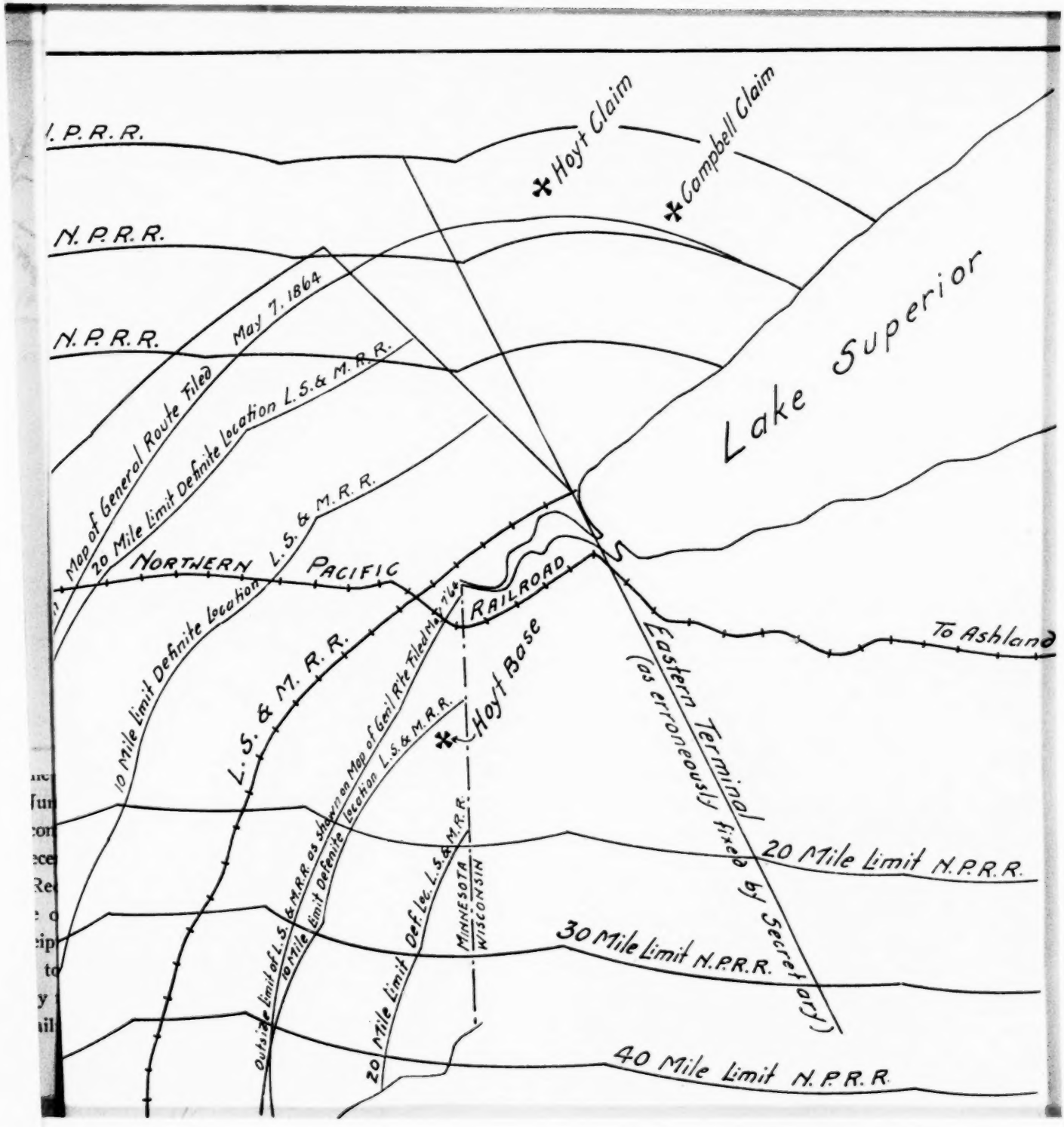
While the land department was in error as to the Railroad Company's eastern terminus and before the court announced decisions in the cases above referred to, Richard B. Jones made an application to enter the land involved in the Hoyt case under the act of Congress approved June 3, 1878, as amended by act of August 4, 1892, commonly known as the "timber and stone law." December 10, 1898, he filed his proofs and paid to the Receiver one hundred dollars, being the purchase price of the land, and thereupon received a receiver's receipt, across the face of which was written: "Subject to any claim the Northern Pacific Railroad Company may have to the land herein described." The Railroad Company's selection

had then been fifteen years of record in the land office against this land, of which fact Jones, when he offered his proofs and money, had emphatic notice. He also was then notified that the land was withdrawn awaiting the result of litigation (Transcript pp. 13, 14, 15, 33, 34). By special warranty deed dated December 19, 1908, Jones conveyed to Minnie Stewart; and on March 22, 1902, Minnie Stewart conveyed to the complainant Hoyt.

The decisions of this court holding the eastern terminus to be at Ashland were announced in April, 1900. On the 2nd of December, 1901, the Commissioner of the General Land Office, on appeal from the action of the local land officers allowing the Jones entry, directed a cancellation of that entry because of the prior selection of the Railway Company. On appeal the Commissioner's decision was affirmed by the Secretary of the Interior August 30, 1905. The Secretary then approved the Railroad Company's selections of the lands involved in the Hoyt and Campbell cases, and on October 18, 1905, patent for these lands issued to the Northern Pacific Railway Company (Transcript pp. 9, 103), which company conveyed by warranty deed to Weyerhaeuser and Humbird.

The case of Campbell is in all of its facts like the case of Hoyt—except that in the Hoyt case the plaintiff's assignor paid his money to the Receiver of the Land Office, taking a receipt in terms subject to the Railway Company's rights, whilst Campbell's application to enter, made October 26, 1895 (Transcript Campbell Case p. 4), was rejected by the land officers and his case stands upon that rejection, he never having tendered his proofs or payment for the land or done


40 Mile Limit N.P.R.R.
30 Mile Limit N.P.R.R.
20 Mile Limit N.P.R.R.
May 7. 1864
Map of General Route Filed
20 Mile Limit Definite Location L.S.& M.R.R.
30 Mile Limit Definite Location L.S.& M.R.R.
Outside Limit of L.S.& M.R.R. as shown on
10 Mile Limit Definite Location
L.S.& M.R.R.
NORTHERN
L.S.& M.R.R.
PACIFI
Outside Limit of L.S.
10 Mile
Limit Definite Location


I. P. R. R.
N. P. R. R.
N. P. R. R.
Hoyt Claim
Campbell Claim
Lake Superior
Map of General Route Filed May 7, 1864
20 Mile Limit Definite Location L. S. & M. R. R.
NORTHERN PACIFIC RAILROAD
L. S. & M. R. R.
10 Mile Limit Definite Location
L. S. & M. R. R.
Hoyt Base
Eastern Terminal (as erroneously fixed by Secretary)
To Ashland
Outside Limit of L. S. & M. R. R. as shown on Map of Gen'l R'te Filed May 7/64
10 Mile Limit Definite Location L. S. & M. R. R.
20 Mile Limit Def'l Loc. L. S. & M. R. R.
MINNESOTA
WISCONSIN
20 Mile Limit N. P. R. R.
30 Mile Limit N. P. R. R.
40 Mile Limit N. P. R. R.

anything farther but to allege in his bill a quite uncertain and indefinite willingness and readiness to pay (Transcript Campbell Case pp. 5-9, 18, 19). The Campbell case differs from the Hoyt case in one other respect, namely, that the lost land furnishing the selection basis lies farther west in Minnesota and is not, like the land in the Hoyt case, within indemnity limits of the Lake Superior and Mississippi grant.

The land involved in the Wass case is within the indemnity limits of the grants to the Territory of Minnesota made in the acts of Congress above referred to. The State of Minnesota conferred the benefit of these grants on the Western Railway Company of Minnesota by legislative act of March 1, 1877. This company filed a selection against the land in suit on the 31st day of December, 1877, and on the 4th of December, 1889, the St. Paul and Northern Pacific Railway Company (successor in interest to the Western Railway Company) filed in the land office an amended selection list assigning for each selection a particular and described loss. The matter appears to have stood without action in the land department until ten years later when, in the month of April, 1899, Fred Wass entered upon the land with the intention of making it a homestead and has ever since been in possession. On the 4th of December, 1899, Wass presented to the land office an application to enter under the homestead laws. The Register and Receiver filed his application, but on the same day rejected it and refused to receive the fees tendered, basing such refusal and rejection upon the ground that the lands filed for were embraced in the then pending though unapproved selection of the St. Paul & Northern Pacific Railway Company.

Wass appealed and the action of the local land office was affirmed by the Commissioner of the General Land Office and by the Secretary of the Interior respectively. Thereupon the Secretary of the Interior on February 16, 1905, approved the selection of the Railroad Company and on March 15, 1905, issued patent to the State of Minnesota, the state issuing its patent in turn to the Western Railway Company of Minnesota. All rights under the patent have become vested in the Northern Pacific Railway Company the plaintiff in error. The selection right under the grant to the Territory of March 3, 1857, appears to be identical with that under the Northern Pacific act of July 2, 1864, section 1 of the 1857 act (11 Statutes at Large 195) giving the right of selection "Subject to the approval of the Secretary of the Interior." The facts in the Wass case are set forth in the answer of Wass (Transcript in No. 397, pp. 6-10).

Hoyt and Campbell seek in their bills to cast a doubt upon the right of the Northern Pacific Railway Company, which is a Wisconsin corporation, to claim as successor in title to the Northern Pacific Railroad Company, the federal corporation, alleging that under the acts of Congress the Rail*road* Company had no power to execute more than one mortgage, and alleging (or leaving it to be inferred) that the Railway Company's title came through foreclosure of a *second* mortgage made by the Rail*road* Company. But the answer and proofs show that the land grant lands, including those in suit, of the Northern Pacific Railroad Company lying in Minnesota were never covered by *any* mortgage executed by the Rail*road* Company but on the contrary were purchased by the Railway Com-

pany under decrees of the United States Court for the District of Minnesota in a general creditor's suit.

The same plaintiffs set up certain legislation in Wisconsin creating the Superior & St. Croix Railway Company, and allege that the Northern Pacific Railway Company is *successor* of the Superior & St. Croix; and that under the Wisconsin legislation the Northern Pacific Railway Company has no right to take or hold any lands not necessary for the operation of its railroad. But the bills and answers make it plain that the Northern Pacific Railway Company is the Superior & St. Croix Company, and not its successor, the change being one of name. The act of Wisconsin of 1895, sec. 7, clearly gives the company the power to purchase the land in suit.

QUESTIONS IN THE CASE.

Proper errors are assigned in each case to cover the questions below stated.

The suit of Hoyt was decided by the Circuit Court of Appeals in his favor, on the ground that the Secretary of the Interior's approval of the Railway Company's selection and the patent to the Railway Company were without authority and void; that the Secretary had no discretion or right to approve this selection, it not having been acted upon when Hoyt's grantor applied to purchase, but was by such application to purchase deprived of all jurisdiction and right to consider the selection and absolutely bound by law to grant the application to purchase; that for this reason the appellants hold their title under the patent as trus-

tee for Hoyt and should be decreed to convey to him.

The Circuit Court of Appeals decided the Campbell case the other way, distinguishing it from the Hoyt case, in that the Receiver of the land office refused to accept Campbell's application and proofs, whilst he did receive the application and proofs and took the money of Hoyt's grantor (though at the same time advising him of the Railway Company's claim on file and giving him a receipt for his money across the face of which was written "Subject to any claim the Northern Pacific Railroad Company may have to the lands herein described"). That Hoyt's grantor actually paid his money to the Receiver of the land office and filed his proofs, in the opinion of the Circuit Court of Appeals, segregated the land from the public domain, so that the Secretary could not after that approve the selection; whilst Campbell's money and proofs the land officers refused to receive, thus leaving the land free of any claim of record; and being so free of claims of record the Circuit Court of Appeals held left the selection under the Secretary's jurisdiction.

In the Wass case the application was not to make a cash purchase but to obtain the land as a homestead. The land officers wholly rejected the application and refused to accept the fees required by law and refused to enter application of record in the land office.

The controlling proposition held by the court below in the Hoyt case is, that notwithstanding the grantee under an act of Congress has suffered a loss and has done everything possible to make selection of indemnity therefor according to law, such selection is ineffective without approval by the Secretary of the Interior; and *that the Secretary cannot legally grant*

that approval after an entry of the land under any public land law, notwithstanding the railroad selection was the first entry, either attempted, or of record in the land office, and notwithstanding the land was free public land subject to the selection at the time of its filing. In the Campbell and Wass cases the local land office had refused *in toto*, in the Campbell case the application to purchase, and in the Wass case the application to homestead. The Hoyt case differs only in the fact that the local land officers erroneously took the applicant's money and filed his entry advising him distinctly that this was subject to the Railroad Company's rights. The Circuit Court of Appeals on this difference in facts decided the Hoyt case against the Railway Company's grantees and the Campbell case for them, whilst the Supreme Court of Minnesota in the Wass case reluctantly followed the Circuit Court of Appeals in the Hoyt case, in effect overruling its own previous decisions in *McHenry v. Nygaard*, 72 Minn. 2, and *Sage v. Swenson*, 64 Minn. 517, though the facts in the Wass case seem like those of the Campbell rather than the Hoyt case.

Opposing counsel in the Hoyt and Campbell cases assert however other propositions (mostly immaterial to the Wass case) which must be noticed. He says:

1. That the Northern Pacific *Railway* Company, as distinguished from the Northern Pacific *Railroad* Company, could take no title, because (a) it did not succeed to the rights of the *Railroad* Company touching the land in suit, (b) the act of Wisconsin of 1895, constituting the charter of the *Railway* Company, section 7 of which confers the right to buy the Northern

Pacific grant, is unconstitutional, as being special legislation.

2. That the loss which was the basis of the selection in the Hoyt suit was not a good loss, because not within the Northern Pacific place or granted lands, by force of the proviso in section 3 of the Northern Pacific grant reading: "*Provided*, that if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line the amount of land heretofore granted shall be deducted from the amount granted by this act." The assertion is, that the Lake Superior and Mississippi grant and the Northern Pacific grant were upon the same general line, and that by reason of the language quoted the lands falling within the grant to the Lake Superior and Mississippi Company were to be deducted from that to the Northern Pacific.

3. That should the last assertion be unsound counsel still contends that the lost lands furnishing the basis of selection in the Hoyt case, even if within the Northern Pacific granted limits, being appropriated to an earlier grant, namely, one of May 5, 1864, may furnish a good basis, for *first* but not for *second* indemnity selections under the Northern Pacific grant; having been, it is asserted, lost to that grant *before* its passage.

4. That the Railroad Company's selections of the lands in suit was irregular, informal, or invalid, because (a) made originally without the assignment to each particular selection of some specific and described loss, and (b) that the loss and the lands selected in

lieu thereof were upon different sides of the track (which is true in the Hoyt and Campbell cases).

5. That the land involved in the Hoyt suit falls within the provisions of the sundry civil bill of July 1, 1898, and should under that bill have been awarded by the Secretary of the Interior to the claimant adverse to the Railway Company.

ARGUMENT.

1. We shall attempt first to show, that the Circuit Court of Appeals erred in holding in the Hoyt case the Secretary's approval of our selection to be beyond his jurisdiction and void.

This conclusion is reached only by saying (as the Circuit Court of Appeals did say) that the entry at the land office of Hoyt's grantor Jones made Jones "from the moment of that purchase" "the owner of the entire beneficial interest in and equitable title to it" leaving in the United States "the naked legal title which it held in trust for him."

But we submit this is begging the whole question, which is whether the entry of Jones did make him the equitable owner. If it did there is an end of the Hoyt case. But the very question in that case is whether Jones got any rights, and if so what rights, by his entry as against the selection. To determine this question we cannot start with his entry, but must look at the events touching this title in the order of time.

And in the order of time we find first that the Northern Pacific, having suffered a loss (as we shall try to show later) entitling it to select indemnity,

found this piece of vacant public land, against which there were no claims or rights, of record in the land office or otherwise; and on the 17th day of October, 1883, it entered a selection of that land at the land office. It followed up the selection and some years later altered its form to comply with new regulations of the department.

Such a selection filed and recorded, as it was, against this land in the land office, the land department has uniformly regarded as an *entry* and as having the same effect to segregate the land from the general bulk of public lands that any other entry has. *Porter v. Landrum*, 31 L. D. 352; *Southern Pacific Railroad Co.*, 32 L. D. 51; *Santa Fe Pacific Railroad Co.*, 33 L. D. 161; *Eaton, et al., v. Northern Pacific Railway Co.*, 33 L. D. 426; *Santa Fe Pacific Railroad Co. v. Northern Pacific Railway Co.*, 37 L. D. 669. The well settled rule is stated as follows by the then Assistant Attorney General (now United States Circuit Judge) Willis Van Devanter in *Southern Pacific Railroad Company*, 32 L. D. 51:

> "Under this legislation the company was, by the direction or regulations of the Secretary of the Interior, required to present at the local land office selections of indemnity lands, and these selections, when presented conformably to such direction or regulations, were to be entertained and noted or recognized on the records of the local office. When this was done the selections became lawful filings; and while, until approved and patented, they would remain subject to examination, and to rejection or cancellation where found for any reason to be unauthorized, they, like all other filings, were entitled to recognition and protection so long as they remained undisturbed upon the records.

There is no question in this case as to the sufficiency of the loss assigned, or as to the formality and regularity of the selection.

What effect has been given to a pending railroad indemnity selection?

Prior to 1887 the rights of a railroad company within the indemnity belt of its grant were protected by executive withdrawal, but on August 15, that year, these withdrawals were revoked, and the land restored to settlement and entry; but such orders, although silent upon the subject, were held not to restore lands embraced in pending selections. (*Dinwiddie v. Florida Railway & Navigation Co.*, 9 L. D. 74). In the circular of September 6, 1887 (6 L. D. 131), issued immediately after the general revocation of indemnity withdrawals, it was provided that any application thereafter presented for lands embraced in a pending railroad indemnity selection, and not accompanied by a sufficient showing that the land was for some cause not subject to the selection, was not to be accepted, but was to be held subject to the claim of the company under such selection. In fact, a railroad indemnity selection, presented in accordance with departmental regulations and accepted or recognized by the local officers, has been uniformly recognized by the land department as having the same segregative effect as a homestead or other entry made under the general land laws."

This is not saying that the selection before approval by the Secretary confers the least right or title, and is therefore entirely consistent with *Humbird v. Avery*, 195 U. S. 480. But that the selection duly recorded at the land office is an entry, which may ripen into title if afterwards approved by the Secretary, as held by Judge Van Devanter, is a proposition, not only uniformly held by the land department, but well established by decisions of this court.

In *Oregon & California Railroad Company v. United States,* 189 U. S. 103, Mr. Justice Harlan delivering the opinion stated the precise point, saying (p. 112):

> "Now, it has long been settled that while a railroad company, after its definite location, acquires an interest in the odd-numbered sections within its place or granted limits—which interest relates back to the date of the granting act—the rule is otherwise as to lands within indemnity limits. As to lands of the latter class, the company acquires no interest in any specific sections until a selection is made with the approval of the Land Department; and then its right relates to the date of the selection."

In *Shepley v. Cowan,* 91 U. S. 330, the court considered a conflict between a pre-emption claim and a selection on behalf of the State of Missouri under an act of Congress conveying to the state five hundred thousand acres of land *to be selected* by the Governor, the act providing that if the selection should be approved by the Secretary patents were to issue. The court (p. 337) said touching conflicts between such right of selection and a pre-emption:

> "The party who takes the initiatory step in such cases, if followed up to patent, is deemed to have acquired the better right as against others to the premises. The patent which is afterwards issued relates back to the date of the initiatory act, and cuts off all intervening claimants. Thus the patent upon a State selection takes effect as of the time when the selection is made and reported to the land-office; and the patent upon a pre-emption settlement takes effect from the time of the settlement as disclosed in the declaratory statement or proofs of the settler to the register of the local land-office."

On page 338, after distinguishing *Frisbie v. Whitney*, 9 Wall. 187, and *Yosemite Valley Case*, 15 id. 77, the Court said:

> "But whilst, according to these decisions, no vested right as *against the United States* is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or other acquisition of the land, when the United States have determined to sell or donate the property. In all such cases, the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right."

The exact proposition was the basis of decision in *McCreery v. Haskill*, 119 U. S. 327. In that case the State of California had the right to select lands, the act requiring the selection before becoming effective to be approved by the Secretary of the Interior. The case involved a conflict between a selection by the state made April 22, 1868, and afterwards approved by the Secretary, and a settlement claim instituted one year and eight months after the selection but before the Secretary's approval. The court held that the land was open to both claims, to selection on behalf of the state and to settlement and pre-emption by settlers, and held that a selection approved by the Secretary at a later day related back to its filing and cut out the claim under the settlement laws.

The question seems to have been decided in this court at a much earlier date. We refer to *Campbell v. Doe*, 13 Howard 244. That case came up from the Supreme Court of Ohio, where it was reported in 17 Ohio 267, and the controversy before coming

into court had been waged before the Secretary of the Treasury, Roger Brooke Taney (whose powers then included control of public lands). The case involved an act of Congress passed on the 20th of May, 1826, which authorized selection by the Secretary of the Treasury of certain lands for school purposes. The board of county commissioners of the County of Lawrence filed in the local land office in Ohio a request that the Secretary of the Treasury select certain lands for school purposes under this law. The Register transmitted the selection to the Commissioner of the General Land Office. Afterwards Robert Hamilton applied at the local land office in Ohio to enter the land and was informed of the selection and that on that account the land was withheld from sale. Thereupon Hamilton with the assent of the Register of the Land Office entered and paid for the quarter section and took a final receipt. The Secretary of the Treasury afterwards approved the request of the Commissioners of Lawrence County and selected the land for school purposes under the act of Congress. The case was submitted to the court upon an agreed statement of facts and under stipulation that should the court be of opinion that the entry by Hamilton was valid, notwithstanding the then pending unapproved selection, judgment should be entered for the defendants, otherwise for the plaintiff.

In this court Mr. Vinton, in support of the selection, argued:

> "The title thus vested in the State * * * reaches back to the date of the original selection of the land for schools, and the report of it, as such, to the Commissioner of the General Land Office. * * * The selection of the land * * *

> and the report of it, by the Register, to the General Land Office, by direction of the Secretary, for his decision thereon, being necessary and proper preliminary steps towards carrying the act into execution, had the effect in law to sever the land thus selected and reported from the mass of the public lands until his decision was had; and, when approved by him, the whole proceeding was in law one act, and constituted the selection by the Secretary required by the act."

The court said it was clear that the Secretary of the Treasury had power under the act of Congress to make the selection, notwithstanding the intervening entry of Hamilton, and affirmed the judgment of the Supreme Court of Ohio which had been in favor of the selection.

When Jones, the grantor of Hoyt, went to the land office December 17, 1897 he found the selection entry of the railroad company there of record and ordered canceled only because it was east of Duluth. It had been so of record for over fifteen years unacted upon by the Secretary. Such delays are not uncommon. The duties of the Secretary are judicial. He must determine in the first place whether there are deficiences in the grant giving the right to select, and in the second place whether the particular lands selected can properly be taken for those deficiencies, *Wisconsin Central Railroad Co. v. Price County*, 133 U. S. 496, 511. When Jones offered his proofs and money in December, 1898, the land was withdrawn to await the court's decision and he was most distinctly advised of the inception of a right in the railroad company, which might ripen into title by the Secretary's approval, and he chose with open eyes to buy into that contest. He is entitled to no equitable consideration

and should stand on his legal right. *Campbell v. Doe, supra.* To Hoyt, Campbell and Wass the language clearly applies which was used by the court in *Gertgens v. O'Connor,* 191 U. S. 237, 246:

> "It is well to look further into his equities. It will be borne in mind that he did not go upon the land until April, 1891. The tract was within the indemnity limits of the company's grant, and was, therefore, subject to selection. It had been withdrawn from entry under the land laws, and that fact appeared on the records of the local land office. It had, in fact, been selected by the company, and that selection had not been cancelled. Ireland's contract of 1883 was of record in the office of the register of deeds of the county, and shown on the books of the company. The defendant applied for leave to enter the lands as a homestead, and was denied such leave by the local land officers on the ground that it was within the twenty-mile indemnity limits of the railway company's grant, and had been selected by the company. He was charged with knowledge of the act of Congress giving a preferential right of purchase from the government in case the company's title should in any way fail. Notwithstanding all this, he remained upon the land and put his improvements on it, and now claims to be entitled to the rights of a *bona fide* settler. He does not come within the letter of the statute, nor does he come within the reach of any reasonable equities. He evidently took his chances on the possibility of the company's failing to obtain title and a subsequent failure of Ireland to insist upon his preferential right of purchase. He went upon the land with full knowledge of all the facts, which showed that he had no right to enter, speculating upon possibilities which have not been realized, and having so speculated he cannot complain if he suffer the consequences which often attend the failure of a speculation."

To say, that by his application and payment under the circumstances, Jones acquired *"entire beneficial interest and equitable title"* and reduced the title of the United States to a *"naked legal title,"* is not only to beg the question, but to contradict the well settled authorities in the land department and the decisions of this Court above cited.

Jones and his grantees cannot complain of the doctrine of relation being applied to them, and only by so applying it can justice be done. Certainly the right to select indemnity is clearly provided in the land grants and was intended to be a valuable right. Owing to the enormous areas comprised within those grants and the limited force in the department of the interior, it is customary that many years elapse before a selection can even be considered. The grantee entitled to select of necessity files in the land department a selection claim specifying particular land. That selection, like any other entry in the land department, becomes a matter of record against that land. When the Secretary reaches consideration of the selection and approves it, equity, legal analogies, and the rules applied to all other entries at the land office require, that the approval and patent should be held to reach back to the inception of the claim. This doctrine is applied to all entries under the public land laws, and necessarily so, because time must elapse before they can be consummated, and in order to preserve the right in the interim approval and patent must relate back to the filing of the claim in the land office; or to put the matter in another way, what the Secretary was called upon to decide and what he did decide was that the selection was valid *when filed*.

The doctrine of relation has been defined as follows:

"Where there are divers acts concurrent to make a conveyance, estate or other thing, the original act shall be preferred; and to this the other acts shall have relation." *DeForest v. Ramsey*, 3 Cow. 75, 80.

"There is no rule better founded in law, reason, and convenience than this, that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation." *Landes v. Brant*, 10 How. 348, 373.

"By the doctrine of relation is meant that principle by which an act done at one time is considered by a fiction of law to have been done at some antecedent period. It is usually applied where several proceedings are essential to complete a particular transaction, such as a conveyance or deed. The last proceeding which consummates the conveyance is held for certain purposes to take effect by relation as of the day when the first proceeding was had. Thus, in the present case, the patent, which was issued in 1862, is said to take effect by relation at the time when the survey and plat of the location, made in 1818, were returned to the recorder of land titles under the act of Congress. At that time the title of the claimant to the land desired by him had its inception, and so far as it is necessary to protect his rights to the land, and the rights of parties deriving their interests from him, the patent is held to take effect by relation as of that date." *Gibson v. Choteau*, 13 Wall. 92, 100.

See, also,

United States v. Anderson, 194 U. S. 394;
Musser v. McRae, 44 Minn. 343.

In the recent case of *United States v. Detroit Lumber Co.*, 200 U. S. 321, 334, the court said:

"If it be contended that, by virtue of the contracts for the sale of timber, it had acquired some

interest in the lands prior to the issue of patents, it is sufficient to say that by the doctrine of relation the patents, when issued, became operative as of the dates of the entries. It is true that this doctrine is but a fiction of law, but it is a fiction resorted to whenever justice requires. It is that principle by which an act done at one time is considered to have been done at some antecedent time. It is a doctrine of frequent application, designed to promote justice. Thus, a sheriff's deed takes effect not of its date, but of the time when the lien of the judgment attached. The ordinary railroad land grants have been grants *in praesenti*, and under them the title has been adjudged to pass, not at the completion of the road, but at the date of the grant. *Leavenworth, Lawrence & Galveston Railroad v. United States*, 92 U. S. 733; *St. Paul, etc., Railway Co. v. Phelps*, 137 U. S. 528; *St. Paul & Pacific v. Northern Pacific*, 139 U. S. 1; *United States v. Southern Pacific Railroad*, 146 U. S. 570. A patent from the United States operates to transfer the title, not merely from the date of the patent, but from the inception of the equitable right upon which it is based. *Shepley v. Cowan*, 91 U. S. 330. Indeed, this is generally true in case of the merging of an equitable right into a legal title. Although the patents in this case were not issued until after the sales of the timber, yet when issued they became operative as of the date of the original entries. This doctrine has frequently been recognized by this and other courts. *Landes v. Brant*, 10 How. 348; *Lessee of French and Wife v. Spencer*, 21 How. 228; *Stark v. Starrs*, 6 Wall. 402; *Lynch v. Bernal*, 9 Wall. 315; *Gibson v. Chouteau*, 13 Wall. 92; *Simmons v. Wagner*, 101 U. S. 260; *Jackson v. Ramsey*, 3 Cow. 75; *Welch v. Dutton*, 79 Ill. 465; *Ormiston, Guardian, v. Trumbo, Admr.*, 77 Mo. App. 310. In the first of these cases it was said (p. 372):

"To protect purchasers, the rule applies, "that where there are divers acts concurrent to make a conveyance, estate, or other thing, the original act shall be preferred; and to this the other acts shall have relation," as stated in Viner's Abr. tit. Relation, 290. * * *

'Cruise on Real Property, vol. V., pp. 510, 511, lays down the doctrine with great distinctness. He says: "There is no rule better founded in law, reason and convenience than this, that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation." ' "

Should it be said that relation cannot cut out the rights of third persons, that again would be begging the question, for the very inquiry at issue is what rights can be acquired by intervening applicants. Relation is never applied except to cut out intervening alleged rights. The assertion of such rights is necessary before the rule can come into play. It is a general principle that relation is enforced for the furtherance of justice, but is not applied to defeat intervening rights or equities of innocent third persons. But Jones and his grantees are not innocent third persons or purchasers in good faith without notice. Certainly one who applies to enter public lands, against which there is already a filing of record of which he is advised, is not a purchaser without notice. Jones had emphatic notice, but elected to enter a contest: there is no equitable reason why the principle of the decisions before cited, "prior in time first in right," should not apply to his case.

The whole contention to the contrary is based upon the language used in the opinion in *Sjoli v. Dreschel,*

199 U. S. 564. Having in mind the danger of applying general language to facts not involved in the case before the Court, which Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 264, 399, warned us against, it is most important to note carefully the facts in the Sjoli case. These were, that Sjoli being a qualified homesteader settled upon the land in 1884 with the intention to make it a homestead. He grubbed and broke part of it, built a house and stable thereon and moved into the house with his family in October, 1884. He had lived with his family upon the premises continually ever since, had broken twenty-two acres and had constructed fences and other improvements of the value of five hundred dollars. He was in occupation of the land, claiming it as a homestead *before the railway company filed its selection.* In 1889 he applied for patent and followed up his application so that in June, 1901, his entry *was approved and patent issued to him.* The other party to the suit, Dreschel, had no title except such as was conferred by a *selection disapproved by the Secretary.* In that case therefore the homesteader was first in time, and the Secretary had disapproved the subsequent selection on the very principles for which we contend. The approval of his application related back to his settlement to cut out the railroad selection. In this case on the contrary the selection was filed when the land was vacant and unappropriated, many years before the attempt to place of record a hostile claim and the entry was *subject* to the selection. Moreover, the Secretary approved the selection and issued the patent to the selector. There is nothing in *Sjoli v. Dreschel* holding that the Secretary *must* disapprove a selection merely be-

cause of a later entry, because the court takes pains to point out that the selection had been *disapproved* in the Sjoli case, and repeatedly alludes to the fact that Sjoli's settlement *was prior in time.*

Mr. Justice Harlan says, on page 566, that until selections are approved by the Secretary lands embraced in the selection lists are subject to be disposed of by the United States, or to be settled upon and occupied under the pre-emption and homestead laws. This was a sufficiently accurate statement as applied to the facts of that case; but we submit, that the language could not have been intended to go entirely outside of those facts, to determine cases whose facts are essentially different and to overrule the settled decisions of this court and of the land department. It is admitted, that until the selection is approved by the Secretary, land subject thereto is in the control and jurisdiction of the department, and that the selection confers no title upon the selector. This was held in *Humbird v. Avery*, 195 U. S. 480. It is admitted that land under an unapproved selection is subject to be disposed of by the United States. This is the result of many decisions. And the further statement that such land may be entered under the pre-emption and homestead laws may be admitted to its fullest extent so far as these cases are concerned.

But the question is, what is meant by saying that such land is subject to entry under the pre-emption and homestead laws? Simply we submit what was held in *Oregon & California Railroad Company v. United States, Shepley v. Cowan, McCreery v. Haskill, Campbell v. Doe*, before cited, namely, that entries may be filed which operate to create a contest

and also to take the land providing the selection is *disapproved*. *La Bar v. Northern Pacific R. R. Co.*, 17 L. D. 406, was such a case. But there is no ruling in the Sjoli case that such selections *if approved* will not relate back and cut out intermediate filings. We contend that it was never intended in the Sjoli case to decide more than, that such filings might be made to be passed on by the Secretary in connection with the selections. This interpretation of the language brings the case into complete harmony with previous decisions of the court, and the construction contended for by opposing counsel makes the decision conflict with what was before decided. Mr. Justice Moody, when attorney general, in opinion of June 19, 1906, considered this question at length and decided in favor of our contention. Opinions of Attorneys General, vol. 25, p. 632.

Our contention is made more evident when we consider the statement of Mr. Justice Harlan in the opinion, that the propositions laid down in the Sjoli case are laid down in numerous decisions of the court (n. p. 566). For, whilst these decisions support our interpretation of the language of the court, not one of them supports the contrary interpretation.

To infer from the language of the opinion in the Sjoli case the proposition that an application to purchase under the land laws *ipso facto* annuls a prior selection and withdraws it from the consideration of the Secretary is contrary to the decision written by Mr. Justice Harlan in *Humbird v. Avery*, 195 U. S. 480. In that case it appeared that the railway company had filed certain selection lists (which included the very selections here involved in the Hoyt and Campbell

cases) and that entries under both the homestead and other laws had afterwards been made; that the land department had not acted upon either the selections or the entries. The suit was brought relying upon the unapproved selections, an important item of relief prayed being the restraint of threatened trespass by cutting timber. The Assistant Attorney General was allowed to intervene in the case, and pressed upon the court the proposition that lands in this status were still under the jurisdiction of the land department; that *it must act upon the selections and determine their regularity and validity before the matters complained of could be carried into court for adjudication.* This court sustained the argument and in substance sent the case to the department for it to decide as between the selections and the entries. It was not suggested by any counsel that the mere filing of an entry voided a prior selection, and had that been the view of the court the decision must have been that the railway company had no equity or standing before the department and the department no jurisdiction, except to pass upon the entries disregarding the selections.

If we are right in contending that the Secretary had jurisdiction to approve the selections, all three cases under discussion are thereby disposed of in so far as concerns the questions on which they were all decided below. The Campbell case was decided in our favor by the Circuit Court of Appeals on the ground of differences between that case and the Hoyt case—mainly upon the ground that Campbell had no entry in the land office whilst Hoyt's grantor had. The question whether the Campbell case was rightly decided below (assuming that the Hoyt case was also right-

ly decided) we submit upon the opinion of the Circuit Court of Appeals and upon the argument by counsel associated with us in the Campbell case. However, if the decision of the Campbell case below is sound, it ought, we submit, to control the Wass case, because Wass like Campbell never had an entry in the land office which could segregate the land from the public domain and thus avoid the selection; and Wass like Campbell was distinctly advised of the selection and elected to engage in a contest.

This leaves certain other questions raised by counsel in the Hoyt and Campbell suits to be considered.

2. It sufficiently disposes of all objections to the right of the Northern Pacific *Railway* Company as distinguished from the Northern Pacific *Railroad* Company, to say that Hoyt and Campbell cannot raise the question. If the Railway Company is not the successor of the Railroad Company the result is that the *Railroad* instead of the *Railway* Company is entitled to the land. Whilst this might give the Railroad Company the right to recover the title, it does not help either of these plaintiffs. They sue to charge the defendants as trustees of the legal title for *them*—and in the Campbell case it is prayed in addition that the land be restored to the public domain. But if the selections are otherwise good (and the Secretary has held them good) they cut out both Hoyt and Campbell, and it does not aid them to assert that the Railroad Company instead of the Railway Company should have had the land.

However, it may be well to point out that the *Railway* Company has purchased and succeeded to all the rights of the *Railroad* Company. The proofs show

that upon a bill filed by judgment creditors (not mortgage creditors) of the Northern Pacific Railroad Company, the Circuit Court, May 27, 1896, entered a decree of sequestration and appointed receivers (Transcript pp. 177-183). April 27, 1899, a final decree of sale was made, amended May 25, 1899 (Transcript pp. 145-156), ordering the sale to pay debts of all the lands in Minnesota, and rights to receive lands under grants from Congress or otherwise of the Northern Pacific Railroad Company. The Master's report of sale (Transcript pp. 156-177) was filed August 26, 1899, and a final decree confirming the sale was entered September 20, 1899 (Transcript pp. 184-187). The Master's report showed that the sale was made to the Northern Pacific Railway Company and it became a party to the final decree confirming the sale. The Circuit Court is therefore shown formally to have adjudicated in a proceeding properly before it the successorship of the Railway Company to the Railroad Company so far as the lands in suit are concerned. The plaintiffs' allegation impeaches this decree.

The land having passed to the Railway Company in the manner shown, the question whether the mortgages executed by the Railroad Company and foreclosed against it in other proceedings in the Circuit Court (which mortgages did not cover the land in suit) were lawfully executed and properly foreclosed, is immaterial.

The proofs moreover show that in addition to the deed of the Special Master to the Railway Company and the deed of the receivers of the court to the Railway Company (Transcript pp. 189-197), the Northern Pacific Railroad Company under the pro-

visions of the decree executed and delivered a deed to the Railway Company, which conveyed all the lands and rights to land of the Railroad Company in the State of Minnesota. (Transcript pp. 197-201.)

And notwithstanding that the plaintiffs are in no position to raise the objection, we desire to show to the court that the Wisconsin act of 1895, printed as an exhibit to the bill (Transcript pp. 55-65), which authorizes the Superior & St. Croix Railroad Company, now Northern Pacific Railway Company, to purchase the railroad of the Northern Pacific Railroad Company (section 7 of which authorizes the company to purchase its land grant) was valid legislation. It was an act amending a private and local law of 1870, creating the Superior & St. Croix Railroad Company. November 7, 1871, an amendment to the constitution of Wisconsin was adopted, prohibiting certain special legislation. Among other kinds, legislation "for granting corporate powers or privileges, except to cities." In *Attorney General v. Railroad Companies*, 35 Wis. 425, and *Black River Improvement Company v. Holway*, 87 Wis. 584, it had been held, before the passage of the act of 1895 referred to, that the constitutional amendment did not impair the power of alteration and amendment by special act of charters passed prior to 1871. In *Attorney General v. Superior & St. Croix Railroad Company*, 93 Wis. 604, the Attorney General of Wisconsin unsuccessfully applied to the Supreme Court of the State for an information in the nature of *quo warranto* challenging the right of the Superior & St. Croix Company to exercise the franchises conferred by the amendatory act of 1895.

We refer the court to the opinion of the Secretary

in this case citing opinions of Attorney General Harmon and Attorney General Moody holding the *Railway Company* to be lawful successor of the *Railroad Company*. (Transcript pp. 34, 35.)

3. The lands were not exempt from the Northern Pacific's selections because of the Lake Superior and Mississippi grant, or of anything done under it.

(a) There is nothing in the suggestion that the proviso in section 3 of the Northern Pacific act, which deducted from the grant to that company any lands theretofore granted by the United States to another railroad "as far as the routes are upon the same general line," operated to *deduct* from the lands granted to the Northern Pacific the lands within the conflicting limits of its grant and that of the Lake Superior and Mississippi Company. This for the good and sufficient reason that the two grants are not upon the same general route. One grant extended from St. Paul to the head of Lake Superior, approximately and substantially north and south. The other grant extended from Lake Superior to Puget Sound, approximately and substantially east and west. Whilst the two grants did not cross each other at perfect right angles, they did so approximately, as shown by the diagram printed opposite page 43, transcript. *Doherty v. Northern Pacific Ry. Co.*, 177 U. S. 421; *United States v. Northern Pacific Railroad Co.*, 177 U. S. 435.

(b) It therefore follows that the lands used as a basis of loss for the selection in question were within the place limits of the Northern Pacific grant. They were not within the place limits of the Lake Superior and Mississippi grant, but only within its limits of indemnity. Nor were they within the order of with-

drawal of May 26, 1864, made under that grant (which distinguishes this case from *Northern Lumber Company v. O'Brien*, 204 U. S. 190, and *Northern Pacific Railroad Company v. Musser-Sauntry L. L. & Mfg. Co.*, 168 U. S. 604). It is true that the base land was conveyed by the United States under the grant of May 5, 1864. But it *did not pass by that grant.* It passed because it fell within its indemnity limits, and was selected as indemnity *after the date of the Northern Pacific grant and prior to the definite location of that road.* Being lost therefore to the Northern Pacific grant, not before its passage, but after, it clearly formed the basis for a second indemnity selection (see opinion of Secretary, Transcript pp. 35, 36).

4. A good and sufficient answer to all criticisms upon the form or regularity of the selection list is, that the selections were by the terms of the act to be made subject to the approval of the Secretary of the Interior, and he has approved them.

But it may be suggested as a limitation upon the right of selection (a) that the selection must be made on the side of the railroad where the loss occurred.

From the beginning no such limitation under the Northern Pacific grant has ever been suggested by any Commissioner of the General Land Office or by any Secretary of the Interior. That the land department rules the other way and holds that selections under the Northern Pacific act are not thus limited is sufficiently indicated in its decisions set forth as exhibits in the record.

Neither is the limitation warranted by the language of the indemnity clause in question, which is:

> "And whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

No qualification being imposed by Congress as to the side of the road upon which selection may be made, no such qualification can be inserted in the act by judicial legislation.

Counsel refers to the case of *United States v. Burlington and Missouri River Railroad Company*, 4 Dillon 297, affirmed 98 U. S. 334, as establishing that under the Northern Pacific grant selections of indemnity are confined to that side of the railroad on which the loss occurs. But an examination of those decisions shows that they are based on a peculiarity of the grant there considered. That grant did not provide indemnity and the decisions cited did not relate to indemnity but to *granted* lands. Section 19 of the Burlington and Missouri act, considered in the decisions cited, grants to that company every alternate section (except those reserved) designated by odd numbers *to the amount of ten sections per mile on each side of said road*. The opinion of Mr. Justice Miller was that this language conferred no right to take more on either side of the road than what amounted to ten sections per mile on that side, and that, if for any reason the required number of sections could not be found on one side, it was a loss for which indemnity was not provided in the act; that there existed therefore no power in the land department to issue patents for lands lying on the

north side in lieu of lands deficient on the south side. This court said as to this that the grant contemplated one-half of the land to be taken on each side of the road and that the department could not enlarge the quantity on one side to make up the deficiency on the other. This case has therefore no bearing upon the question at issue.

The case of *Southern Pacific Railroad Company v. Smith*, 74 Fed. Rep. 588, seems to be like this and we submit that it was decided erroneously. It is contrary to the plain language of the act, as we have shown, and contrary to the unvarying ruling of the land department. We are advised moreover that the Circuit Court granted a rehearing in that case and ordered defendants to show cause why the decision should not be reversed; that no ruling was ever made upon this order to show cause because the case ceased to be important, the lands having been ascertained to fall within the conflicting grant of the Atlantic and Pacific Company.

(b) There is nothing in the suggestion, should it be made, that no selections can be made from the second indemnity limits until it is shown that the lands within the first indemnity limits along the entire line from Lake Superior to Puget Sound are exhausted.

Such a contention is flatly contradictory of the terms of the joint resolution of 1870, establishing the second indemnity limits. If the first three lines of that resolution had been framed with the specific intention to make such an assertion impossible they could not have been more efficiently worded. The resolution means precisely what it says, that the right to second indemnity lands shall arise whenever, at the time of final

location of the road, there is not *in any state or territory,* within the limits prescribed by the original charter, the amount of lands per mile granted to the company by Congress. The material part of the joint resolution reads as follows:

> "And in the event of there not being in any state or territory in which said main line or branch line may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such state or territory, within ten miles on each side of said road beyond the limits prescribed in said charter, as will make up such deficiency on said main line or branch, except mineral and other lands, as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, subsequent to the passage of the act of July two, eighteen hundred and sixty-four."

That the first indemnity limits in Minnesota were deficient to furnish selections to make the losses good involved in the Hoyt and Campbell cases was necessarily adjudicated by the Secretary when he approved the selections and issued the patents. Upon settled rules we can say that his decision of this question of fact is conclusive.

5. It may be urged in the Hoyt case that the act of Congress of July 1, 1898 (30 Stat. 620), operates to give the plaintiff Hoyt the land in his suit and to compel the Railway Company to select elsewhere. Notwithstanding the statement of the Circuit Court

of Appeals in the Campbell case, it seems clear that this question cannot be raised in that case; nor do we understand that Campbell's counsel so contends. Campbell, having no entry of record against the land, falls clearly outside the law in question and the act need only be considered with reference to the case of Hoyt.

The material provisions of the act are:

> "That where, *prior to January first, eighteen hundred and ninety-eight*, the whole or any part of an odd-numbered section, in either the granted or the indemnity limits of the land grant to the Northern Pacific Railroad Company, to which the right of the grantee or its lawful successor is claimed to have attached by definite location or selection, has been *purchased* directly from the United States *or settled upon* or *claimed in good faith by any qualified settler* under color of title or claim of right under any law of the United States or any ruling of the interior department, and where purchaser, settler, or claimant refuses to transfer his entry as hereinafter provided, the railroad grantee or its successor in interest, upon a proper relinquishment thereof, shall be entitled to select in lieu of the land relinquished an equal quantity of public lands, surveyed or unsurveyed, not mineral or reserved, and not valuable for stone, iron, or coal, and free from valid adverse claim, or not occupied by settlers at the time of such selection, situated within any State or Territory into which such railroad grant extends, and patents shall issue for the land so selected as though it had been originally granted; but all selections of unsurveyed lands shall be of odd-numbered sections, to be identified by the survey when made, and patent therefor shall issue to and in the name of the corporation surrendering the lands before mentioned, and such patents shall not issue until after the survey; *Provided however*, That the Secretary of the Interior shall

from time to time ascertain and, as soon as conveniently may be done, cause to be prepared and delivered to the said railroad grantee or its successor in interest a list or lists of the several tracts which have been *purchased or settled upon or occupied as aforesaid, and are now claimed by said purchasers or occupants*, their heirs or assigns, according to the smallest government subdivisions. And all right, title, and interest of the said railroad grantee or its successor in interest in and to any of such tracts, which the said railroad grantee or its successor in interest may relinquish hereunder shall revert to the United States, and such tracts shall be treated, under the laws thereof, in the same manner as if no rights thereto had ever vested in the said railroad grantee, and all qualified persons who *have occupied and may be on said lands* as herein provided, *or who have purchased said lands in good faith as aforesaid*, their heirs and assigns, shall be permitted to prove their titles to said lands according to law, as if said grant had never been made; and upon such relinquishment said Northern Pacific Railroad Company or its lawful successor in interest may proceed to select, in the manner hereinbefore provided, lands in lieu of those relinquished, and patents shall issue therefor: *Provided further*, That the railroad grantee or its successor in interest shall accept the said list or lists so to be made by the Secretary of the Interior as conclusive with respect to the particular lands to be relinquished by it, but it shall not be bound to relinquish lands sold or contracted by it or lands which it uses or needs for railroad purposes, or lands valuable for stone, iron, or coal: *And provided further*, That whenever any qualified settler shall in good faith make settlement in pursuance of existing law upon any odd-numbered sections of unsurveyed public lands within the said railroad grant to which the right of such railroad grantee or its successor in interest has attached, then upon proof

thereof satisfactory to the Secrtary of the Interior, and a due relinquishment of the prior railroad right, other lands may be selected in lieu thereof by said railroad grantee or its successor in interest, as hereinbefore provided, and patents shall issue therefor: *And provided further*, That nothing herein contained shall be construed as intended or having the effect to recognize the Northern Pacific Railway Company as the lawful successor of the Northern Pacific Railroad Company in the ownership of the lands granted by the United States to the Northern Pacific Railroad Company, under and by virtue of foreclosure proceedings against said Northern Pacific Railroad Company in the courts of the United States, but the legal question whether the said Northern Pacific Railway Company is such lawful successor of the said Northern Pacific Railroad Company, should the question be raised, shall be determined wholly without reference to the provisions of this Act, and nothing in this Act shall be construed as enlarging the quantity of land which the said Northern Pacific Railroad Company is entitled to under laws heretofore enacted: *And provided further, That all qualified settlers*, their heirs or assigns, who, prior to January first, eighteen hundred and ninety-eight, *purchased or settled upon or claimed in good faith*, under color of title or claim of right under any law of the United States or any ruling of the Interior Department, any part of an odd-numbered section in either the granted or indemnity limits of the land grant to the Northern Pacific Railroad Company to which the right of such grantee or its lawful successor is claimed to have attached by definite location or selection, may in lieu thereof transfer their claims to an equal quantity of public lands surveyed or unsurveyed, not mineral or reserved, and not valuable for stone, iron, or coal, and free from valid adverse claim, or not occupied by a settler at the time of such entry, situated in any State or Territory into

> which such railroad grant extends, and make proof therefor as in other cases provided; and in making such proof, credit shall be given for the period of their *bona fide* residence and amount of their improvements upon their respective claims in the said granted or indemnity limits of the land grant to the said Northern Pacific Railroad Company the same as if made upon the tract to which the transfer is made; and before the Secretary of the Interior shall cause to be prepared and delivered to said railroad grantee or its successor in interest any list or lists of the several tracts which have been purchased or settled upon or occupied as hereinbefore provided, he shall notify the purchaser, settler, or claimant, his heirs or assigns, claiming against said railroad company, of his right to transfer his entry or claim, as herein provided, and shall give him or them option to take lieu lands for those claimed by him or them or hold his claim and allow the said railroad company to do so under the terms of this Act."

The purpose of the act is obvious—to furnish a means of adjustment of controversies between the Northern Pacific and the settlers within its grant. The cry for its passage came from homesteaders and preemptors who had gone onto lands under various rulings of the department, which had been overruled in the courts, or were there being challenged. The settler in danger of being dispossessed was alone in the mind of Congress. The government has ever been tender of settlers upon the public lands, and the law would never have been passed to protect the timber or stone speculator.

The purpose of the law was to protect those who would be subjected to real loss and hardship if the claim of title of the railroad company should be sustained. Settlers under the homestead law, or under

any other settlement law, would fall in that category. Not only would their improvements be lost, but their time of residence could not be credited to them upon entry of other lands. This was felt to be a real hardship. But a cash purchaser under the timber and stone law could by the failure of his purchase suffer no loss, except a loss of expected profits. His money would be repaid by the government. And so far as a mere applicant to purchase is concerned, he could suffer no loss of any sort. The equities of such purchasers and applicants under the timber and stone law could never have moved Congress to pass the act of 1898, and should not now move the land department and courts to any special effort to extend the act so as to include them.

The language of the act requires, first, that the right of the settler should have attached "prior to January first, eighteen hundred and ninety-eight," thus excluding conflicts created after that date. It is restricted carefully to lands, prior to the date named, "purchased directly from the United States or settled upon or claimed in good faith by any qualified settler under color of title or claim of right," etc. The last proviso allows "settlers, their heirs or assigns," to transfer their claims to other lands "not valuable for stone, iron or coal."

This statute should be construed not only with due regard to all the language therein contained, but in connection with prior similar legislation, namely, the acts of 1874 and 1890, which were acts for the relief of settlers only. The first clause of the act of 1898 may be read in two ways, depending on whether the words, "by any qualified settler," relate to and qualify

the entire preceding clause, "has been purchased directly from the United States or settled upon or claimed in good faith," or whether they relate to and qualify only the words, "settled upon or claimed." The former interpretation is by far the more reasonable. The word "purchase" is used with reference to a purchase by a settler, and the distinction drawn, between lands purchased and lands settled upon or claimed, was simply to make it clear that the act was intended to apply equally, whether the settler's rights had been consummated by purchase, or only initiated by settlement or claim.

Any doubt upon this subject seems to be put at rest by the susequent provisions of the act. The last proviso clearly applies only to qualified settlers who purchased or settled in good faith. This clause is as free from ambiguity as language can be, and should settle whatever doubt arises from the loose construction of the first clause.

This interpretation is much strengthened by the fact that the timber and stone act is limited to lands valuable for timber or stone and unfit for cultivation. The act of 1898, in permitting the transfer of settlers' claims, provides that lands valuable for stone shall not be so taken. This proviso is manifestly inconsistent with the view that the act was intended to cover timber and stone entries.

If our construction is not correct, the result is that the act of 1898, by being extended to lands acquired under the timber and stone law, is in direct conflict with the settled policy of land legislation. Such a construction permits a cash purchaser under the timber and stone law to take in lieu thereof agricultural lands

without any settlement. The policy of disposing of agricultural lands for cash without residence and qualification was terminated by the repeal of the pre-emption law in 1891.

It should not be supposed by the court that the eastern terminal controversy played the slightest part in the passage of the act of 1898. It is demonstrable that that act was in fact passed for the relief of settlers, and without any reference to that controversy. There were substantially no controversies in the country involved in the eastern terminal question when the act of 1898 was passed. The decision of the supreme court of Wisconsin, which was the first concerning the eastern terminus, was made June 23, 1898, and the provision of the sundry civil bill under discussion was introduced as an amendment by Senator Wilson, of Washington, in March, 1898. All the lands of the Northern Pacific Railroad Company in Minnesota were at that time in the hands of receivers. The act was passed to assist settlers in the state of Washington, and some other settlers upon agricultural lands, whose settlements were jeopardized by the decision in *McHenry v. Nygaard*, 72 Minn. 2, decided April 22, 1898.

However, it is not necessary to determine whether *purchasers* under the timber and stone law are included in the act of 1898. It is sufficient for this case to point out that Jones, under whom Hoyt claims title, had only filed an application for the land before the first of January, 1898, and paid his money and filed proofs December 10, 1898, with full notice of the railway company's rights, and under a receipt subordinating his entry to those rights. No vested right and no inchoate right had been acquired by Jones before the

date fixed by the act of 1898. His application initiated no right as against the government, and prior to his final proof and payment the Secretary might suspend the land from sale and disposition under the public land laws. This is precisely what was done in this case. The tract was withdrawn from entry by the order of February 28, 1898, and the payment of Jones was allowed under a receipt expressly stipulating that such payment was subject to any claim of the railway company. The decisions of the department in the case of Jones, attached to the bill of complaint as exhibit "B" (Transcript pp. 33-41), and in the case of *Eaton v. Northern Pacific Ry. Co.*, 33 L. D. 426, leave little to be said.

It is hardly necessary to refer to the numerous decisions of this court in which it has been held, that where a statute is of doubtful meaning the settled interpretation of the land department will be followed by the court. *Hewitt v. Schultz*, 180 U. S. 139.

6. In conclusion, let us remind the court that the defendants have purchased in good faith from the patentee of the United States. The patent is not one issued inadvertently, and no suggestion is made of any fraud in obtaining it. Every fact and every question of law preliminary to its issue were fully argued upon both sides, and carefully considered by the Commissioner of the general land office, and by the Secretary of the Interior. Both of those officers have decided every question in the case against the entrymen. The rule in such cases is well settled by a long line of decisions that the department's decision is

conclusive as to the facts and cogent as to the law. It can only be overruled for a mistake of law, and the mistake must be clear. *Smelting Company v. Kemp*, 104 U. S. 636, 646; *Maxwell Land-Grant Case*, 121 U. S. 325, 379; *Barden v. Northern Pacific Railroad Co.*, 154 U. S. 288, 325-331.

CHARLES W. BUNN.

FILED.
JAN 25 1910
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1909.

No. 954.

FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD, Appellants,

vs.

HERBERT H. HOYT, Appellee.

Appellee's Brief

H. H. HOYT,
Counsel and Solicitor for Appellee.

MILLAR PRINTING CO.

SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1909.

No. 195.

FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD, Appellants,

vs.

HERBERT H. HOYT, Appellee.

BRIEF OF HERBERT H. HOYT, APPELLEE.

It is with great deference that I appear in this Court to present for your consideration the claim of the appellee to the land involved in this action. Notwithstanding all these adverse conditions I propose to contend that the equitable title to this land is in the appellee. I shall endeavor to make my argument as brief as I can, and weary the Court with unnecessary matters as little as possible. I consider it my duty, however, to speak freely about the case itself. In this I must not be understood as reflecting upon the parties defendants or their counsel. Men have

different notions of right and wrong; doubtless the conduct of my opponents square equally with their own ideas of propriety.

THE CHARTER OF THE NORTHERN PACIFIC RAILROAD COMPANY.

It would be difficult for the Court to understand the issues involved in this case without a knowledge of the facts surrounding them. The Northern Pacific Railroad Company was incorporated by an act of Congress, approved July 2, 1864 (13 Stat. at L. 365). Among other things it was authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, namely: Beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin, thence westerly by the most eligible railroad route, as shall be determined by said company, within the territory of the United States, on a line north of the 45 degree of latitude to some point on Puget Sound, * * * and it was by the act vested with all the powers, privileges and immunities necessary to carry into effect the purposes as therein set forth.

The capital stock of said company was to consist of one million shares of one hundred dollars each, which were in all respects to be deemed personal property, and transferred in such manner as the by-laws of said corporation shall provide.

The incorporators under this act were 134 politicians scattered among 24 States and Territories.

By Section 3, it was enacted:

"That there be and hereby is granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, *on each side of said railroad line*, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile *on each side of said railroad* whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections. *Provided, That if said route shall be found upon the line of any other railroad to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes*

are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act."

At the date of this act, the States through which the Northern Pacific Railroad Company would construct said railroad were the States of Wisconsin, Minnesota and Oregon, and the Territories would be North Dakota, Montana and Washington. Through the states, including the indemnity limits, there would be a strip of land eighty miles in width, and in the Territories said strip would be one hundred and twenty miles in width; the grant would include the alternate odd sections within said area the whole length of the road, to-wit: 2220 miles; equal to an area of 78,000 square miles of the public domain, and with the two indemnity limits added, the amount set apart by the government to aid in the construction of the Northern Pacific Railroad, would be about 102,000 square miles of the public domain.

The act of July 2, 1864, and the joint resolution of May 31, 1870, contemplated that only the lands within the place limits were granted, but it gave to the railroad company the right to select in lieu of lands lost from the place limits, lands within the two indemnity limits of said railroad. The Northern Pacific Railroad Company apparently knew no difference between the lands within the place, and lands within the indemnity limits, and disposed of the same when opportunity presented without regard to the distinction. If the lands were within the indemnity limits and the Northern Pacific Railorad Company sold the same and for any reason the title failed, the purchaser of said land could acquire the title to the same by purchase under the act of Congress approved March 3, 1887, and the Northern Pacific Railorad would relinquish its claim to such land, and select other lands in lieu thereof.

By Section 10 of said act, it was provided:

"That all people of the United States shall have the right to subscribe to the stock of the Northern Pacific Railroad Company until the whole capital named in this act of incorporation is taken up, by complying with the terms of subscription; and *no mortgage or construction bonds shall ever be issued by said company on said road, or mortgage, or lien made in any way, except by the consent of the Congress of the United States.*"

The theory of the organization of the Northern Pacific Railroad Company under the act of Congress of July 2, 1864, was that the stockholders of said road should always be in control of the affairs of the company, and that no mortgage or lien of any kind should be placed upon the railroad; that the enormous amount of land granted would be sufficient to construct the railroad, and after it was built the road would be owned and conducted by, and for the benefit of the stockholders, we shall see hereafter how the intention of Congress in this particular was afterwards made of no effect.

To provide for the completion of this railroad within a reasonable time, Congress by Section 19, of said act provided:

"That unless said Northern Pacific Railroad Company shall obtain bona fide subscriptions to the stock of said Company to the amount of two million dollars, with ten per centum paid in within two years after the passage and approval of this act, it shall be null and void."

Congress by Section 20 of said act further enacted:

"That the better to accomplish the object of this act, namely, to promote the public interest and welfare

by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in times of war) the use and benefit of the same for postal, military and other purposes, Congress may, at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter, amend, or repeal this act."

The Northern Pacific Railroad Company accepted the provisions of this act, and it was under the power thus conferred, that the Northern Pacific Railroad Company was authorized to act. It was an agreement between the United States on the one part, and the Northern Pacific Railroad Company on the other. Neither party to the contract was authorized to bind the other by doing any act outside of the provisions of the charter, the charter was the measure of its power, and without the mutual consent of both parties, no material change in its terms could be made.

By Section 8 of said act it was enacted:

"That each and every grant, right and privilege herein are made and given to, and accepted by, said Northern Pacific Railroad Company, is upon, and subject to, the following conditions, namely: That the said Company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than 50 miles per year after the second year, and shall construct, equip, furnish and complete the whole road by the 4th of July, 1876."

It was found by those in control of the affairs of the Northern Pacific Railroad Company at that time, that

the Company was not financially in condition to commence the construction of said road, and as it was prohibited by Section 10 of its charter, to execute a mortgage or lien in any way upon the railroad and the lands granted to it, the company applied to Congress for consent to mortgage its prospective holdings for the purpose of securing bonds to be issued in the construction of its road, and Congress on May 31, 1870, passed (16 Stat. at L. 378) a joint resolution, the material part of which is as follows:

> "That the Northern Pacific Railroad Company be, and hereby is, authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by *mortgage* on its property and rights of property of all kinds and descriptions, real, personal and mixed, including its franchise as a corporation; and in the event of there not being in any State or Territory in which said main line or branch may be located, at the time of the final location thereof, the amount of land per mile granted by Congress to said Company, within the limits prescribed by its charter, then said Company shall be entitled, under the direction of the Secretary of the Interior, to receive so many sections of land belonging to the United States designated by odd numbers, in such State or Territory, within ten miles on each side of said road beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of 1864, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the act of July 2, 1864, * * * and if the *mortgage* hereby authorized shall at any

time be enforced by foreclosure or other legal proceedings or the mortgage lands hereby granted, or any of them, be sold by the trustees to whom such mortgage may be executed, either at its maturity or for any failure or default of said company under the terms thereof, such lands shall be sold at public sale, at places within the States and Territories in which they shall be situate, after, not less than sixty days' previous notice, in single sections or subdivisions thereof, to the highest and best bidder."

It will be noticed from the reading of this resolution, that in the event of default made in any of the conditions of the mortgage, resulting in its foreclosure, specific directions were given as to the manner the sale of the lands covered by said mortgage should be conducted, this was a statutory requirement that must be complied with in order to divest the title by proceedings under the sale. It will also be noticed that the resolution speaks of a mortgage, not mortgages.

It will be noticed also that under this joint resolution there was no authority conferred upon the railroad company to incur any obligation, that might thereafter become a lien on the property of the company. It also appears that whatever rights the Northern Pacific Railroad Company might have to lands within the second indemnity limits of said grant, such rights were cofnerred upon it by this joint resolution; it was not, however, an absolute right, but could only be obtained "in the event of there not being in any State or Territory in which said main line or branch may be located at the time of the final location thereof, the amount of land per mile granted by Congress to said Company within the limits prescribed by its charter (when these facts appeared), "the said Company shall

be entitled, under the direction of the Secretary of the Interior to receive so many sections of land belonging to the United States, &c."

It would appear from this resolution that it was the intention of Congress by its adoption, that before any second indemnity limits could be legally established the land department should examine and determine whether within any State or Territory through which the road was to pass there was any deficiency requiring another indemnity limit; there should be some record evidence of that fact without which the land department would have no authority to establish such limits, the records in this case show no such determination and in fact no action of this kind was ever taken.

THE JAY COOKE MORTGAGE DATED JULY 1, 1870, AND THE EVENTS TRANSPIRING UNDER THE SAME.

Under the Joint Resolution approved May 31, 1870, the Northern Pacific Railroad Company, July 1, 1870, mortgaged to Jay Cooke and John Edgar Thomson, as trustees, all its rights, liberties, franchises and property, including its land grant and railroad, to secure an issue of its bonds not exceeding fifty thousand dollars per mile for the whole length of its railroad and branches then authorized by acts of Congress. The length of the road was then estimated to be about 2,500 miles. These bonds were payable in gold at the end of thirty years from their date, with interest coupons, payable also in gold, semi-annually, at the rate of seven and three-tenths per cent per annum. At the

date of this mortgage, the Northern Pacific Railroad Company did not own a single acre of land within the congressional grant of July 2, 1864, neither had any general route of said railroad been established, nor had any efforts been made towards the construction of said railroad. The mortgage given covered only lands belonging to the United States, the amount secured by this mortgage, to-wit: $50,000 per mile of road was amply sufficient to construct and equip the Northern Pacific Railroad from Lake Superior to Puget Sound. Under the provisions of the act of July 2, 1864, the Company was not to pay anything for right-of-way over government lands or for grounds upon which to build depots and other necessary structures, any ties, stone or earth required to be used in the construction of said road, when found upon the public domain were freely given to the railroad by the Government of the United States. Nature had seemingly graded the whole road from Lake Superior to the Rocky Mountains. It was nearly a dead level plain the whole way. There was no heavy grading to be done, no deep cuts to be made, no expensive fillings or costly bridges to construct, no right-of-way to be bought, no grounds for station houses, water tanks or other structure to be purchased, no stone, timber or ties to be paid for, all of these were made a free gift from the government. This road under these circumstances could have been constructed and equipped at a cost not exceeding $15,000 per mile.

On August 13, 1870, the Northern Pacific Railroad Company filed its map of the general route of its road with the commissioner, which map was accepted by the land department. The eastern terminus of said road, according to said map, was at the mouth of Montreal river, the boundary line between the States of Wisconsin and Michigan, from

thence it ran in a westerly direction to Walla-Walla in the State of Washington; after the filing of the map of general route the Secretary of the Interior ordered a withdrawal of lands embraced within the limits of the general route as shown by the map of said route on file in the office of the Commissioner of the General Land Office, and also withdrew lands within the first and second indemnity limits of said railroad. In other words there was withdrawn by order of the land department a strip of land 80 miles in width in the states and 120 miles in width through the territories. These orders of withdrawal remain unrevoked to this day. The line of the general route and of definite location of said road passed through Section One in Tp. 48 N, R. 17 W., in the State of Minnesota, that point being known as Thomson's Junction, at which place it intersects the Lake Superior and Mississippi Railroad Company, that company being the beneficiary of the State of Minnesota under an act of Congress dated May 5, 1864. The State of Minnesota having been granted lands to aid in the construction of a railroad from St. Paul to Lake Superior. The Northern Pacific Railroad Company began the construction of its road in 1871, at the intersection of the Lake Superior & Mississippi Railroad Company in Section 1, Tp. 48 N., R. 17 W., and continued westerly on its line of definite location to the Missouri river, a distance of about four hundred miles. On January 1, 1874, it made default in the payment of the interest on its bond issued under the Jay Cooke mortgage, amounting in the aggregate to $30,735,600, and the road was placed in the hands of a receiver and the trustees of said mortgage commenced an action in the Circuit Court of the United States for the Southern District of New York to foreclose said mortgage. Subsequently, a plan of reorganization of the financial af-

fairs of the Northern Pacific Railroad Company was proposed and adopted, by which the capital stock of the company was to remain as fixed in the act of July 2, 1864, but was to be divided into preferred and common stock. The amount of preferred stock was fixed at 51,000 shares and the amount of the common stock at 49,000 shares. It was proposed to use the amount received for the preferred stock to take up the $30,735,600 bonds outstanding and for every $1,000 of these outsanding bonds, it proposed to give the holder of the same, preferred stock to the amount of $1,400. This would take 43,000 shares of preferred stock to purchase the $30,735,600 in bonds. The remainder of the preferred stock ($9,000,000) was to be used to retire outstanding land warrants, bonds to pay the floating debt of the company and generally for the purpose of carrying into effect the plan of reorganization, it appears that thereafter $15,790,653 of said preferred stock had been under said plan of reorganization converted into lands in the State of Minnesota and Dakota, east of the Missouri river, leaving still outstanding $35,209,346 of preferred stock in possession of the stockholders of said company. The lands acuired under the grant to the Northern Pacific Railroad Company in the State of Minnesota, and Dakota, east of the Missouri river, amounted in the aggregate to 8,115,198 acres.

The preferred stock under this plan was to have all the rights and privileges of the common stock, together with the right to vote and the holders thereof would be entitled to dividends in each calendar year, not exceeding 8 per cent per annum of the net earnings, before any dividend would be paid on the common stock. By this plan it was agreed that the preferred stock might be convertible at par value into lands belonging to the company east of

Missouri river in the State of Minnesota and North Dakota. Common stock was to be issued to the amount authorized by the charter less the amount of 51,009 shares of preferred stock. The common stock was to have no voice i nthe management of the affairs of the company until 1878 and was to receive no dividends on such stock until there was a surplus after the dividends were paid on the preferred stock. It will be seen from the above statement that the Northern Pacific Railroad Company with all of its property, including its grant of land, was taken from its stockholders, and turned over to its bond holders, this was contrary to the intention of the act of Congress of July 2, 1864. It appears that the cost of the construction of this four hundred miles of road from Thomson Junction to Missouri river exceeded the sum of $100,000 per mile of road. It also appears that after the acceptance of this plan of reorganization, the property and effects belonging to the Northern Pacific Railroad Company was placed in possession of the preferred stockholders, that at that time all the indebtedness of said company was supposed to be liquidated, and such indebtedness as was not paid was represented in the stock of said road. Those that controlled the affairs of said company from 1871 to 1874, less than three years, had expended about one hundred millions of dollars of the company's funds for which the assets appearing were 400 miles of railroad, and eight million acres of land.

By the consummation of this plan of reorganization, the financial affairs of the Northern Pacific Railroad Company were wholly rearranged substantially all of its indebtedness, existing at the time of the adoption of the plan, was cancelled, its capital stock outstanding at that time was surrendered, and the preferred and common stock provided for. It was a realjustment of its financial affairs under

and within the original act of incorporation, and without the sanction of any additional legislation by Congress, the preferred stockholders were placed in control of the company which, with the subsequent bondholders, have since managed to shape the policy of the railroad although holding but a small majority of the stock.

THE NORTHERN PACIFIC RAILROAD COMPANY AFTER ITS FIRST RE-ORGANIZATION.

After the re-oroganization of the Northern Pacific in 1875, said corporation was free from debt, except to its stockholders. It had four hundred miles of completed road, and had earned 8,000,000 acres of land.

Section 10 of the act of Congress, approved July 2, 1864, prohibited the Northern Pacific Railroad Company from giving any mortgage or construction bonds on said road or mortgage or lien made in any way, except by the consent of the Congress of the United States. "The Joint Resolution approved May 31, 1870, provided:

> "That the Northern Pacific Railroad Company be, and hereby is, authorized to issue its bonds to aid in the construction and equipment of its road and to secure the same by mortgage on its property and rights of property, & c."

This resolution was passed prior to any act performed by the Northern Pacific Railroad Company looking towards the construction of said road. And under this resolution a mortgage was given covering the entire road from Montreal river to Puget Sound, securing the payment of

bonds not to exceed $50,000 per mile for the whole length of the road, and as it appears there was issued $30,725,600 bonds under this mortgage prior to January 1, 1874. The authority under the Joint Resolution of May 31, 1870, was restricted. The bonds could only be issued for the purpose of constructing and equipping said road. The mortgage was given July 1, 1870, and the bonds were issued, secured by its provisions and four hundred miles of the road had been constructed and equipped from the proceeds thereof, prior to January 1, 1874. The complainant is advised and will insist that the power given to the Northern Pacific Railroad Company to issue its bonds and to secure the same by mortgage conferred upon the company by the Joint Resolution of May 31, 1870, was a charter power, that power was exhausted when the former mortgage was executed and bonds issued thereunder, that any subsequent mortgage that might be given by the company would be without effect and absolutely void.

A simliar case to this was that of the East Tennessee, Virginia & Georgia Railway Company vs. Frasier et al., 169 U. S. 196 (L. ed.), in which Mr. Justice Brewer, speaking for the court, declared that where permission was given in the charter of a railroad to borrow money on the credit of the company and secure the same by a mortage of its charter and works, it was a charter power and this special right to mortgage when once exercised was exhausted and in respect to future contracts and rights was as though said charter power had never been granted. The rights to issue bonds under the Joint Resolution, and secure the same by mortgage, was restricted to the construction and equipment of said road. It appears that the Northern Pacific Railroad Company had under this provision given its mort-

gage July 1, 1870, on the whole length of its road to secure the payment of bonds to the amount of $50,000 per mile of road, and had under that mortgage issued more than $30,000,000 of its bonds and had constructed four hundred miles of its road, after which and on January 1, 1874, the Northern Pacific Railroad Company went into the hands of a receiver, it was subsequently re-organifed and the Northern Pacific Railroad Company turned over to its stockholders who operated the road up to January 1, 1881, when another mortgage was given, eight years had elapsed since this charter power was exercised and exhausted, and we insist under this statement that there was no authority to execute any other mortgage under the provisions of the Joint Resolution of May 31, 1870.

It appears, however, that the Northern Pacific Railroad Company executed and delivered to the Central Trust Company of New York its so-called General First Mortgage, dated January 1, 1881, to secure an issue of bonds not exceeding $25,000 per mile of road, which mortgage covered the entire length of road and this mortgage covered the constructed as well as the unconstructed portion of the road. Its land grant was also included in this mortgage as well as the four hundred miles of road that had been constructed, equipped and in operation eight years prior to the date of said mortgage; under Sec. 10 of the act of July 2, 1864, and Joint Resolution of May 31, 1870, this mortgage was certainly inoperative and void. This mortgage, however, was not foreclosed and was subsequently discharged, but the amount found due on said mortgage in the final accounting was added to the sum which was found due from the Northern Pacific Railroad Company and this property sold under the sequestration proceedings, and the pretended sale of the property east of the Missouri river,

was made to satisfy the amount. The Northern Pacific Railroad Company executed and delivered to the Farmers Loan & Trust Company three other mortages dated respectively November 20, 1883, December 1, 1887, and December 2, 1889, in each of these three mortgages the lands east of the Missouri river was expressly excepted, and was not covered by these later mortgages.

On August 15, 1893, The Farmers' Loan & Trust Company of New York et al., filed its bill of complaint against the Northern Pacific Railroad Company in the Circuit Court of the United States for the Eastern District of Wisconsin, answer to said bill was filed and receivers were appointed the same day. The receivers took possession of the property of said company, ancillary proceedings on this complaint were taken in the State of Minnesota, and other districts in the several states through which the road ran or in which the Northern Pacific Railroad Company was interested in some thirty different railroads which branched off from the main line of said railroad between Lake Superior and Puget Sound, and it was connected with other corporations, making in number about 50, that all of these separate corporations formed what was called the Northern Pacific Railroad Company system, and it was insisted in said bill that it was necessary to maitnain and preserve this system and the only way it could be done was to place the property in the custody of the court.

On October 18, 1893, a bill of complaint was filed in the Circuit Court of the United States for the Eastern District of Wisconsin by the Farmers' Loan & Trust Company of New York, against the Northern Pacific Railroad Company and others, defendants, the purpose of which was the foreclosure of the several mortgages given by the Company to the complainant, answer was filed by the defend-

ants in which the facts of the bill were admitted and the court appointed the same persons receivers in this case as were appointed in the former case.

To show the object to be sought by the filing of these separate complaints, a portion of the matters sworn to in the respective bills are here placed in parallel columns.

AUGUST 15, 1893.	FORECLOSURE CASE FILED OCT. 18, 1883.
That said property may be shielded and preserved as a valuable single trust property by adequate judicial protection and the sums due and to become due to the defendants, bondholders and creditors secured and ultimately paid in full; but your orator avers that unless such a course is pursued, to-wit: the taking of the property into judicial custody, said property will be dismantled, dissipated and dismembered and vast sums of money will be lost to the various creditors and stockholders of said Company. And your orator avers that the unity of the property and its integrity as a whole, as now held and operated, constitute one of the most important elements of its value and that to permit its severance will result in ruinous sacrifice of every interest in said property.	In consequence of the embarrassed conditions of the financial affairs of the mortgagor company, and on account of the many difficulties which are manifest upon and from all allegations hereinbefore containtained, involved in the execution of your orators said trusts, it is impossible for your orator, as trustee under the said mortgages, to execute its said trusts, in the way and manner specified and provided in and by the said mortgages without the aid or interposition of this Honorable Court in chancery sitting; *nor can the said trusts be executed, as your orator is advised and charges and the rights of all parties interested be ascertained and fully protected in the premises, otherwise than by a judicial sale of the mortgaged premises, and of all the franchises, property premises and appurtenances covered by the said mortgages.*
That the object sought to be accomplished by the defendant in offering its lands	

for sale to settlers at the extremely low prices hereinbefore stated, namely, the settlement of the country tributary to its railroad and the consequent creation of a large and profitable traffic over its railway system, having been accomplished, the time has arrived when the defendant can wisely adopt a policy of holding its remaining lands for considerably higher prices; *and your orator alleges that if the defendant's said railway system and the land so remaining to it can be taken into judicial custody and preserved and managed as a unit, said remaining lands can be sold from time to time for prices equal to their constantly increasing value, and that the proceeds that will be received from such sales, together with the earnings of the defendant's railway system, will be more than sufficient to pay and discharge all the defendant's obligations to its creditors and preserve for its stockholders said railway system freed from debt. If said lands be not taken into judicial custody by the appointment of receivers, authorized and empowered to preserve the same and said railway as a unit, said lands will be sold*

Until such sale can be had, and the proceeds thereof distributed, your orator is likewise advised and charges that it is expedient and necessary that the franchises, property, premises and appurtenances so mortgaged to your orator in trust as aforesaid and all the rights, franchises and property of the mortgagor company, of whatever name, nature, and description, including all its money on hand, and the earnings of the same, be placed in the hands and under the control of a Receiver or Receivers, to be appointed herein by the court, with such proper powers and control over the same as to it, as the court shall see right and equitable to be conferred.

under decrees and executions at the suits of lien holders at prices far less than their value and will not realize, together with said railway system, a sum anything like sufficient to pay the bonds now outstanding under the several mortgages made by the defendant as aforesaid.

On October 18, 1893, the following appears in the records of the case:

> And it is further ordered, that said cause of P. B. Winston and others against the Northern Pacific Railroad Company be, and the same hereby is, consolidated with this cause, and the orders and proceedings had therein are hereby made the orders and proceedings in this cause; the consolidated cause to proceed under the title of this cause, as above recited and set forth.

On November 15, 1893, the following order was made:

CIRCUIT COURT OF THE UNITED STATES FOR THE EIGHTH JUDICIAL CIRCUIT, DISTRICT OF MINNESOTA, THIRD DIVISION.

P. B. Winston, The Farmer's Loan & Trust Company of the City of New York, a Corporation, William C. Sheldon, George R. Sheldon, William S. P. Prentiss, and William C. Sheldon, Jr., co-partners doing business under the firm name and style of William C. Sheldon & Company,

Complainants,

vs.

Northern Pacific Railroad Company, Defendant.

Comes the above named complainants by James E. Markham, their solicitor, and the intervening petitioners Frank A. Seymour, Theodore Borup, Maurice Auerbach and Jasper Tarbox, by their solicitor H. F. Stevens, also the intervening petitioner J. E. Blake by Davis, Kellogg & Severance and Munn, Boyeson and Thygeson his solicitors, and the intervening petitioner Andrew Mortenson by Davis, Kellogg & Severance, W. S. McClenehan, W. A. Fleming and Munn, Boyeson and Thygeson, his solicitors, and the motion of said intervening petitioners to discharge the receivers heretofore appointed in this case by this court, to dismiss the bill; came on to be heard and the court being now well and sufficiently advised in the premises finds that the order of the court appointing receivers upon the

said bill filed in this cause was improvidently made and that said bill of complaint does not state a cause of equitable cognizance. It is therefore ordered, adjudged and decreed that the receivers, Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, heretofore appointed in this cause be and they are hereby discharged as such receivers and the bill of complaint is hereby dismissed. And it appearing to the Court that in a case numbered 645 C. Equity pending in this court, to-wit: Farmers Loan & Trust Company, Complainant, vs. Northern Pacific Railroad Company, Philip B. Winston, George R. Sheldon, William C. Sheldon, William S. P. Prentiss, and William C. Sheldon, Jr., co-partners under the firm name of William C. Sheldon & Company, Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, Receivers of the Northern Pacific Railorad Company, defendants, that the said Thomas F. Oakes, Henry C. Payne and Henry C. Rouse have been appointed receivers of the same property placed in their custody and possession by the order of the court in this cause. It is further ordered that said Receivers retain the custody and possession of said property and account therefor as receivers in the said cause numbered 645 C. Equity, to-wit: Farmer's Loan & Trust Company complainants, against Northern Pacific Railroad Company, Philip B. Winston, George R. Sheldon, William C. Sheldon, William S. Prentiss, and William C. Sheldon, Jr., co-partners under the firm name of William C. Sheldon & Company, Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, receivers of the Northern Pacific Railroad Com-

pany, defendants, aforesaid, to the court of primary jurisdiction in said last named cause.

Dated this 15th day of November, A. D. 1893.

HENRY C. CALDWELL,
U. S. Circuit Judge.

"Endorsed Order discharging receivers and dismissing case. Filed Nov. 15, 1893, Oscar H. Hillis, Clerk."

It appears that the bill filed August 15, 1893, by the Farmer's Loan & Trust Company of New York, et al, against the Northern Pacific Railroad Company upon which the Receivers were appointed, was filed in collusion between the complainants, and the President of the Northern Pacific Railroad Company, without the knowledge of the directors of the Northern Pacific Railroad Company, and in fraud of their rights, and for this reason, and for other causes, the bill filed in the circuit court of the United States for the District of Minnesota, was dismissed and the Receivers appointed were discharged.

The bill filed October 18, 1893, by the Farmer's Loan and Trust Company against the Northern Pacific Railroad Company to foreclose the three several mortgages above referred to, which ancillary complaints were filed proceeded in the Court of Minnesota, these mortgages did not effect any lands east of the Missouri River. Why jurisdiction of this foreclosure bill was retained in the Circuit Court of the United States for the District of Minnesota is not apparent. However, under this foreclosure, a decree of foreclosure and sale, under decree, which was made April 27, 1896, and sale made July 25 1896. On November 16, 1896, the receivers under the bill filed Oct. 18, 1893, to foreclose

said mortgages, were discharged, and in the order for discharge of the receivers appears the following:

> "But it is not intended by this decree to discharge them as Receivers of the Northern Pacific Railroad Company, appointed by decree entered May 25, 1896, upon a supplemental bill filed in this Court by the Farmer's Loan and Trust Company, Complainants, against the Northern Pacific Company and other defendants, but said Edwin H. McHenry and Frank G. Biglow are discharged as receivers in the consolidated cause in regard to all matters except as to such as are included under their said appointment of May 25, 1896."

The decree made and entered May 25, 1896, (Record 145) was based upon the bill of complaint filed August 15, 1893. It commences:

> This cause came on to be further heard upon the bill of complaint filed herein on August 15, 1893, by the Farmer's Loan & Trust Company, Philip B. Winston, George R. Sheldon, William S. P. Prentiss and William C. Sheldon, Jr., with one William C. Sheldon, since deceased and upon answer of the Northern Pacific Railroad Company thereto filed herein on said day, and upon the supplemental Bill of Complaint filed herein this day, and the answer of the Northern Pacific Railroad Company and the other defendants thereto, and upon the other pleadings and proofs herein and upon all the papers on file, etc.

This is the decree upon which the sale of the lands east of the Missouri River was based, and includes the land in controversy.

We have seen that the bill of complaint filed August 15, 1893, was dismissed by the Circuit Court of the United States for the District of Minnesota, November 15, 1893. How can a supplemental bill in the same cause make the original bill effective? The decree dismissing the bill declares:

> That the order of the Court appointing receivers upon the bill filed in this cause was improvidently made and that said bill of Complaint does not state a cause of equitable cognizance. It is therefore ordered, adjudged and decreed that the receivers Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, herebefore appointed in this cause be, and they are hereby discharged as such receivers and the bill of complaint is hereby dismissed.

The controversy now before the court is over the title of a tract of land within the second indemnity limits of the Northern Pacific Railroad Company, in St. Louis County, State of Minnesota. It is conceded that the lands granted by Congress to said railroad lying within the State of Minnesota, and in the State of North Dakota, east of the Missouri River, were not covered by the mortgages sought to be foreclosed by said foreclosure bill filed October 18, 1893, but were expressly excepted therefrom, and therefore, the receivership under the ancillary foreclosure bill in the Federal Court of Minnesota did not extend to the lands granted in that State, and after the discharge of the receivers, and the dismissal of the bill under which the receivers were appointed, was there any receivers other than under the foreclosure bill?

The dismissal of the bill of complaint filed Aug. 15, 1893, by the Federal Court of Minnesota was a denial by

that Court of the jurisdiction of the United States Circuit Court for the Eastern District of Wisconsin over the land grant in the State of Minnesota. After such dismissal the administration of the land grant in Minnesota by the receivers was without legal authority, or even color of authority. There could be no supplemental bill to this bill that had been dismissed, for such a bill presupposes a bill which had a legal standing in Court at the time the supplemental bill is filed. We therefore insist that the order or decree filed May 25, 1896, called a supplemental bill to the bill filed August 15, 1893, was not authorized, had no legal effect, and the proceedings taken under it were absolutely void.

On April 27, 1899, the Circuit Court of the United States for the Eastern District of Wisconsin, directed the sale of lands lying within the State of Minnesota, and the State of North Dakota, east of the Missouri River, and such lands were to be sold in the manner specified in said order. (Record pp. 145, 149). On June 5, 1899, a decree ancillary to that above mentioned was entered in the United States Circuit Court for the District of Minnesota; this order of sale was based upon the decree of the Court of May 25, 1899, and on July 17, 1899, the lands in controversy were sold by the Special Master, to the Northern Pacific Railway Company. (Record 163).

On September 16, 1899, said sale was confirmed by the court. In such decree of confirmation the following appears:

> "And it appearing by the several reports of said special master, so filed as aforesaid, *that he has fully complied with the directions in said decrees as to the sale of said lands* and rights in respect of lands, and

that such purchaser, the Northern Pacific Railway Company, was the highest and best bidder for said lands, and rights in respect of lands, sold as provided in said decree, and that the same were struck off at the several sales thereof to the said purchaser.

We shall show hereafter that the Court was misinformed by the report of the special master as to the manner in which the sale was made and we shall contend that the sale of this land under these proceedings is absolutely void. First, because the bill filed August 15, 1893, upon which this sale was based was dismissed before the supplemental bill was filed, and that there was no legal authority to make the sale. Second, *that the Special Master disregarded the decree of the Court, which directed specifically the manner in which this land should be sold and that the sale was made without any decree to base it upon.*

It may be contended that many of the statements above mentioned should not be regarded by the Court, for the reason that there is no evidence in the case of the facts therein stated. This may be true. The question, however, is as to the title to a tract of land, and the defendants seek to deraign its title through these proceedings of the court, which resulted in a sale to their grantors. In such a case the law requires the defendants to offer in evidence to sustain their title, the whole enrolled record, at least, all those parts of the record that would have any bearing upon the question whether the proceedings as a whole divested the former owner of its title. Pratt vs. Stewart, 10 Mich. 260. In the case of Thatcher vs. Powell, 6 Wheaton 221, it was decided by the Supreme Court of the United States, that no individual, or public officer, can sell and convey a good title to the lands of another, unless authorized so to do by

express law. This is one of those self-evident propositions (says the court) to which the mind assents without hesitation; a person invested with such power must pursue with *precision* the course prescribed by law, or his acts are invalid. This principle has been repeatedly recognized by the Supreme Court of the United States.

In the case of Ransom vs. Williams, 69 U. S. L. ed) the Court on this subject said:

> "The plaintiff asserted a title, and it was for him to show everything necessary to maintain it. The rule on this subject is thus laid down by Chief Justice Marshall, "It is a general principle that the party that sets up a title must furnish evidence necessary to support it. If the validity of a deed depends upon an action in pais, the party claiming under that deed is as much bound to prove the performance of the *act as he would be bound to prove any matter of record on which its validity might depend.* It forms a part of his title; it is a link in the chain which is essential to its continuity, and which it is incumbent on him to preserve. These facts should be examined by him before he becomes a purchaser, and the evidence of these should be preserved as a necessary muniment of title."

If in the records of the proceedings in the case of the Farmers' Loan & Trust Company and others vs. the Northern Pacific Railroad Company filed in the Court August 15, 1893, it appeared that on November 15, 1893, the Circuit Court of the United States for the District of Minnesota, by a decree of said Court dismissed that bill, that being the basis for the order of sale of this land, upon which this land was sold and the sale confirmed, it would be the duty of the defendants to produce this record. No

proceedings of this kind could have been taken on a bill filed simply to foreclose a mortgage. There was no mortgage on these lands. If this record had been offered in evidence in this case it would show that the Court had no jurisdiction to order a sale of this land.

The right to this land depends upon the act of Congress approved July 2, 1864, and the construction of the Joint Resolution of May 31, 1870, Section 10 of the organic act prohibits the Northern Pacific Railroad Company from ever giving "any mortgage or construction bonds on said road, or mortgages or liens in any way except by the consent of Congress."

The United States had a right to make these conditions. There was no limit as to the time, the completion of the road, would have no effect upon them. If Congress had never given its consent that a mortgage might be made by th Northern Pacific Railroad Company covering the granted lands, could any valid mortgage have been given by the Company? It seems to me that there could be no question that if there had been no consent by Congress, no mortgage or lien made covering the granted lands would have been of any effect.

The acceptance of the provisions of the grant of July 2, 1864, by the Northern Pacific Railroad Company, created a contract between the United States and the Company that could not be changed or modified without the consent of both parties.

No court had a right to abrogate the provisions expressed in Section 10, by awarding a decree against the Company for the satisfaction of a lien created by the Court, and thus indirectly do what the law forbids to be done in a direct manner. The act of July 2, 1864, is the

measure of the powers conferred upon the Northern Pacific Railroad Company; what is there expressed, in clear and plain language, is conferred upon it. What is doubtful is expressly excluded. It is clearly shown in these proceedings that the Northern Pacific Railroad Company in its actions disregarded the charter of its creation and conducted its business as if it owned and possessed this enormous grant in fee without any restrictions as to the manner in which it should be used.

Strangers dealing with a corporation are only bound to look to its charter to ascertain the extent of its corporate powers and privileges and notice to them that the corporation will do some things in violation of its charter or beyond its authority, would be of no effect.

Can it conceived as possible that Congress in the enacting of the provisions expressed in the act of July 2, 1864, had the intention under Section 10, of said act to provide that Congress might thereafter give its consent that a mortgage might be given to secure the issue of bonds for the construction of thirty branch lines to the main line of the Northern Pacific Railroad Company, in order that there might be a Northern Pacific Railroad Company system—the proposition would be absurd. Congress in the creating the provisions of the law which incorporated the Northern Pacific Railroad Company and granting aid in its construction, was only interested in obtaining the construction of a road from Lake Superior to Puget Sound. It had no idea that this enormous grant to this road should stand as security to build up any system that those in control, seeking their own interest, should consider advisable. The charter of said Company, as specified in the act of

July 2, 1864, was the measure of its powers, and no amount of ingenious reasoning can change it. It may be claimed that the road having been constructed, the land embraced within its limit, belonged to the Northern Pacific Railroad Company and that Company had the right to do with said lands as the Northern Pacific Railroad Company seemed meet. This we deny. The charter having been granted to the Northern Pacific Railroad Company by act of Congress, July 2, 1864, under certain conditions, Congress would have the right and it would be its duty to see that all the provisions were not only complied with, but were subsequently observed.

If, however, we concede that after the road was constructed, the Government had no further interest in the same, the lands that were within the indemnity limits of said road, the title to which was in the United States, could not be divested except within the terms of the act of July 2, 1864, by any sale made by the order of any Court.

Prior to the decree on the foreclosure of these mortgages, there appears to have existed a committee of bondholders having under consideration a plan to re-organize the Northern Pacific Railroad Company. On March 16, 1896, said committee submitted to the holders of the bonds, and stocks issued and guaranteed by the Northern Pacific Railroad Company, a statement which was afterwards adopted of which the following is taken:

The property of the Northern Pacific Railroad Company comprises, in various forms of ownership and control, a railway system of 4,706 miles; a land grant of about 43,000,000 acres, and sundry bonds, stocks and accounts representing interest in terminals, express, coal and navi-

gation companies. This property is represented by fifty-four (54) corporations which have issued $380,000,000 of bonds and stocks, of which all are now outstanding and $271,949,044 including defaulted interest to December 31, 1896, are owned directly by the Company. The plan for independent re-organization of the property has been drawn upon the following basis:

The ultimate union of main lines, branches and terminal properties through direct ownership by a single company. The railroads of the Northern Pacific system are composed of main line 2,152, 35-100 miles in length or 45 and 73-100 per cent of the whole; the branch lines are 2,554 9-100 miles in length or 54 and 27-100 per cent of the whole.

The first, second and third mortgage bonds are secured by liens in their respective order upon the land grant and upon the main railroad. The consolidated mortgage bonds are secured by a fourth lien upon the land grant and upon the main line railroad, and also by the pledge of first mortgage bonds upon various branch lines having an aggregate length of 1,145 65-100 miles. The public land grant by the United States to the Northern Pacific Railroad Company, under its charter of July 2, 1864, amounted to 12,800 acres of land to the mile of track in the States of Minnesota and Oregon, and 25,600 acres of land per miles in the intermediate territories. At the discretion of the managers of this plan of re-oroganization, if adopted, all of these various properties belonging to the Northern Pacific Railroad Company, will be sold, under one or more of these several mortgages, in default, and a successor company will be organized.

The new company is to authorize the following securities:

First: Prior lien 100-year 4 per cent gold bonds for $130,000,000. These bonds are to be secured by a mortgage upon the main line, branches, terminals, land grant, equipment and other property, embraced in the re-organization, if carried out, and also upon all other property thereafter acquired by the use of any bonds to be issued under both of the new mortgages.

Second: General lien 150-year 3 per cent gold bonds limited in amount to $60,000,000, in addition to a reserve for the 100-year 4 per cent prior lien mortgage of $130,000,000; total amount of both mortgages, $190,000,000. In addition to this there was to be issued $75,000,000 preferred stock, and $80,000,000 common stock, in shares of $100 each and for the purpose of paying the expenses of re-organization as provided in this plan, $5,000,000.

The capital stock of the Northern Pacific Railroad Company at the date of this proposed plan of re-organization was $84,000,000. In the re-organization the stock of the new company was to be $155,000,000, an increase of more than 84 per cent, by a recent vote of the directors the stock of this new company amounts to $250,000,000.

The plan of re-organization having been adopted, and all the property of the Northern Pacific Railroad Company having been sold under decree of the Court to the Northern Pacific Railway Company and the $155,000,000 stock issued as indicated above, one-third of the $75,000,000 of the common stock amounting to $25,000,000 par value was allotted to a syndicate, and acquired for $4,000,000, who have been receiving dividends of 8 per cent on this $25,000,000 or 50 per cent on the amount invested. The dividends for two years has paid the price given by them for the stock. The $4,000,000 investment is commanding on the market more than $40,000,000, or more than 900

per cent. For the retirement of $24,590,000 of Northern Pacific first mortgage bonds there were issued new prior lien bonds amounting to $33,196,000, an inflation of $8,606,000 or 35 per cent. For the conversion of $19,158,000 second mortgage bonds, $32,281,000 of prior lien bonds and preferred stock was issued, an increase of $13,123,000 or 18 per cent. For the conversion of $11,314,000 of third mortgage bonds, there were issued general lien bonds and preferred stock for $19,064,000, an increase of $7,750,000 or more than 68 per cent. In place of $45,104,000 of consolidated mortgage bonds there were issued $58,184,000 of general lien bonds and preferred stock, an increase of $13,080,000 or 29 per cent.

The distinction between the bondholders of the Northern Pacific Company and its stockholders, in this reorganization, is shown by the following; while the bondholders received $1,350 for every $1,000 bond in the old corporation, the stockholders were required to pay to acquire stock in this new corporation, $15 for preferred stock and $10 for common stock, when at the time the market value of such stock was $10 per share; by this scheme the value of the stock in the hands of the original stockholders of the Northern Pacific Railroad Company was destroyed, and they were eliminated from further consideration.

If we turn to the report of the special master as to the sale under the decree of foreclosure of all the proprety of the Northern Pacific Railroad Company, as specified in the statement of the committee above mentioned, we find that the entire railroad system of the Northern Pacific Company, being 4,706 miles in length, was sold for $10,000,000. The fifty-four corporations that had issued $380,000,000 in bonds, of which $271,949,044, was owned

by the Northern Pacific Railroad Company, were sold for $2,000,000; the stocks and bonds owned by the Northern Pacific Company were sold for $500,000; the land grant consisting of 43,000,000 acres of land was sold for $2,545,000, making a total of $15,045,220. The sale of the real estate belonging to the Northern Pacific Railroad Company east of the Missouri river, sold on the sequestration proceedings to pay the creditors of said company, the amount received from said sale gave to the creditors a little less than three cents on the dollar, so that under this plan of re-organization the creditors and stockholders of the company, were both wiped out; all of the property went to the bondholders. If what has been stated is true, the case presents the greatest swindle on the creditors and stockholders and the general public that has come to my notice in this age of frenzied finance.

Can it be possible that there is any water in this business? Something of that kind must be connected with these figures.

Surely the re-organization of public utilities is the safest and most profitable form of robbery. The present tendency of modern finance is towards the more profitable manufacture of water bonds. The principle objects of re-organization are to appropriate the accrued values of frnachise property; to increase the bonded debt enough to absorb all present earnings, and to deceive the pubilc as to the actual costs of the investment—to give to airy nothings a local habitation and a name.

It may be safely affirmed, judging from these facts, that the Wall street speculators, who were interested in

the re-organization of the Northern Pacific Railroad Company were not moved purely by altruistic considerations. The real necessity for such re-organization is not to be found in the insolvent condition of said company, but in the knowledge, that it was becoming a very valuable property. The re-organization was for the purpose of destroying the value of a large amount of its liabilities, for the benefit of a luxurious and unscrupulous class within the inner circle, that the remaining assets might be appropriated by private individuals to enrich themselves at the expense of others.

In this large grant of the public domain, the people had some rights, as well as the company. The act of July 2, 1864, was not passed for the sole benefit of the Northern Pacific Railroad Company. Mutuality in benefits was expected and intended, and mutual obligations were entered into, and equity and good conscience would require of both parties a faithful observance of these obligations.

In my opinion the court had no legal authority to decree the sale of these lands lying between Lake Superior and the Missouri river, and the Northern Pacific Railway Company did not acquire any right to them.

One stands amazed at the mendacity concealed in the figures presented in this plan for the re-organization of the Northern Pacific Railroad Company. With a mortgage for $190,000,000 payable at the expiration of 100 years from its date, the annual interest on which being 4 per cent, payable quarterly in gold, covering 4,706 miles of railroad, including also 43,000,000 acres of land, the free gift of the government. In this enlightened age it does not seem possible that such a mortgage would be executed. It will be a burden on public utilities, upon generations

yet unborn; it would be contrary to all our notions of right and justice, and should be declared absolutely void as being against public policy.

The creditors of the Northern Pacific Railroad Company, together with the stockholders of said Company, can console themselves, however, with the fact, that without these altruistic gentlemen who have made themselves active in this scheme for re-organization, should be able to cross the chasm of death and put on immortality, they will not be in a situation to re-organize the company, when these mortgages mature, they will no doubt be engaged in other useful employments and in a locality, where the wicked cease from troubling.

THE LAND DEPARTMENT.

In order that the Court may understand how this controversy arose, the complainant deems it advisable to state the facts concisely. The Northern Pacific Railroad Company commenced the construction of its road at a point known as Thomson Junction in Section 1, T. 48 N., R. 17 W., at the junction with the Lake Superior & Mississippi Railroad, that road was the beneficiary of the State of Minnesota, who received a grant under the act of May 5, 1864, (13 Stat. at L. 64), to aid of the construction of a railroad from St. Paul to Lake Superior. This grant was prior to that of the grant to the Northern Pacific Railroad Company, whose grant was of the date of July 2, 1864.

The Northern Pacific Railroad Company commenced the construction of its railroad in 1871, from Thomson Junction, westwardly from that point on its definite line of location. It subsequently purchased and acquired an

interest from the Lake Superior & Mississippi Railroad Company of its railroad, which had been constructed from Thomson Junction to Duluth, and it ran its trains over that line for thirteen (13) years. It subsequently constructed its line of road from the intersection with the Lake Superior & Mississippi Railroad Company, easterly from that point, to Superior, Wis., a distance of twenty-five (25) miles, and after the examination of said twenty-five miles by commissioners appointed by the president, and their report thereon, the road from Thomson Junction to Superior, was accepted. In the adjustment of the land grant of the Northern Pacific Railroad it became necessary for the land department to fix the eastern terminus of the Northern Pacific Railroad, and ater considerable discussion on that subject, the Commissioner of the General Land Office, with the approval of the Secretary, on August 27, 1896, fixed the eastern terminus of the Northern Pacific Railroad Company at Duluth. The Commissioner of the General Land Office, with the approval of the Secretary, cancelled the selections made by the Northern Pacific Railroad of all lands that were east of a line as shown by a diagram prepared by the land department and filed in the local land office at Duluth, and declared that all lands, which had formerly been selected by the Northern Pacific Railroad Company, east of said line was restored to the public domain and subject to disposal under the land laws of the United States. The land in controversy was situated east of Duluth and under this order was subject to disposal as belonging to the public domain. This being the situation, Richard B. Jones applied to purchase under the Timber and Stone Law, the land in controversy, and complied with all the rules and regulations of the department required of him to entitle him to said land, paid his money

for the same and obtained the usual receipt. Subsequently the Supreme Court, having the question as to the eastern terminus of said road before it, decided that such terminus was at Ashland, Wisconsin, and not at Duluth; therefore, the Commissioner of the General Land Office, with the approval of the Secretary, on July 12, 1900, vacated his former order, cancelling the Northern Pacific Railroad Company's selections of said land, and restored the former list of selections to the record, and subsequently considered the application of Richard B. Jones for this land, rejected the same, because his application conflicted with the former selection of said land by the Northern Pacific Railroad Company, and afterwards patented the land to the Northern Peafiic Railway Company, without returning or offering to return the amount paid to the United States by Richard B. Jones, for said land. This action is for the purpose of obtaining a decree of this court that the title to this land was vested in Richard B. Jones and that the claim of title set up by the defendants is illegal and void, and should be removed from the record.

STATEMENT OF THE CASE.

On December 17, 1897, Richard B. Jones, being in all respects duly qualified, tendered his application to purchase the Southwest quarter of Southeast quarter (SW¼ of SE¼), Sec. 7, T. 54 N., R. 14 W., in the Duluth Land District, under the provisions of an act of Congress, dated June 3, 1878, entitled "An act for the sale of timber lands in the State of California, Oregon and Nevada, and in Washington Territory," as extended to all the public land states, by act of August 4, 1892. Accompanying the same

was the usual affidavit required in such cases. Jones tendered his application, which was by those in charge of the local United States land office at Duluth accepted and received, such proceedings were afterwards had on said application, that the necessary proofs were taken and completed March 22, 1898, and on December 10, 1898, Jones made payment for the land, and received the usual evidence of title to the same from the Receiver.

On December 19th, 1898, the said Richard B. Jones and wife sold and conveyed to Minnie Stewart, by warranty deed, this land, receiving a valuable consideration therefor. On March 22, 1902, the said Minnie Stewart with her husband sold and conveyed, for a valuable consideration, this land to the complainant. The question involved in this contention is to whom the title of this propertp belongs.

The Northern Pacific Railroad Company, who obtained a grant from the United States to aid in the construction of a railroad from Lake Superior to Puget Sound, in the definite location of its line, found that the base land for which indemnity is claimed in this controversy, fell within the place limits of its grant and it having been patented by the governor of the State of Minnesota, as belonging to land granted to the State of Minnesota, in aid of the construction of a road from Lake Superior to St. Paul, the defendants by reason of its claims, had the right to select as indemnity this land. This proposition is denied by the complainant.

ACT OF JUNE 3, 1878.

The several decisions of the land department in this case demand an examination of the act of 1878, to ascertain what rights the complainant has under the act, and whether the department, by a misapplication of the law to an admitted state of facts, has deprived the complainant of that to which he has acquired a right under the sanction of that act.

The act of June 3, 1878, provides that land valuable chiefly for its timber, but unfit for cultivation, and which has not been offered at public sale according to law, may be sold to citizens of the United States in quantities not exceeding one hundred sixty (160) acres, to any one person, at the minimum price of two dollars and fifty cents per acre. Any person desiring to avail himself of the provisions of this act is required to file with the register of the proper land district, a written statement in duplicate designating by legal subdivisions, the particular tract of land he desires to purchase; this statement must be verified by the oath of the applicant before the register or receiver of the land office within the district in which the land is situated.

By an examination of the record in this case (Record p. 25), we find that Richard B. Jones made the written statement in the manner required by law to purchase this land, the date of said application being December 17, 1897. His application being accompanied with the sworn statement required to be made, and verified in the manner specified in the act, his application to purchase said land was accepted, and the usual certificate upon payment for said land was issued. When the timber applicant files with the register a written statement, verified as the law requires, he initiates a valid claim to the land and has a

preference right to purchase against everybody, but a prior claimant and the United States. The prior claimant, if any exists in this case, was the Northern Pacific Railroad Company. Whatever claim it had to the land arose from its preliminary selection of this land on October 17, 1883. The United States never asserted any claim to this land, other than the general one that the land belonged to the public domain. The existence of an adverse claim does not affect the validity of the timber and stone filing, but such claim must be disposed of in some way before the claim of the applicant under the act of 1878 could be allowed, and when it appears in such a case that there may be an adverse claim, a hearing should be ordered, and if it should be found that such adverse claim was valid, the rights of the timber applicant would thus be disposed of. The power of the department to cancel entries of this character upon sufficient proof that the land at the time of the filing of the written statement was not subject to entry, is not disputed, but it is insisted that the department can only act in such cases within the law, the Secretary is not authorized to destroy a title to land in an arbitrary manner, or if he does he misapplies the law, and the Courts will grant relief.

On the 5th day of May, 1864 (13 Stat. at L. p. 64), Congress passed an act entitled, "An Act making a grant of lands to the State of Minnesota, to aid in the construction of the railroad from St. Paul to Lake Superior." The first section of said Act is as follows:

> "That there be and there is hereby granted to the State of Minnesota, for the purpose of aiding in

the construction of a railroad in said state from the City of St. Paul to the head of Lake Superior, EVERY ALTERNATE SECTION OF PUBLIC LAND OF THE UNITED STATES, NOT MINERAL, DESIGNATED BY ODD NUMBERS, TO THE AMOUNT OF FIVE ALTERNATE SECTIONS PER MILE ON EACH SIDE OF THE SAID RAILROAD ON THE LINE THEREOF, WITHIN THE STATE OF MINNESOTA; BUT IN CASE IT SHALL APPEAR THAT THE UNITED STATES HAVE, WHEN THE LINE OF THE ROUTE OF SAID ROAD IS DEFINITELY FIXED, SOLD, APPROPRIATED, RESERVED OR OTHERWISE DISPOSED OF ANY SECTIONS OR ANY PARTS THEREOF, GRANTED AS AFORESAID, OR THE RIGHT OF PREEMPTION OR HOMESTEAD SETTLEMENT HAS ATTACHED TO THE SAME, THEN IT SHALL BE THE DUTY OF THE SECRETARY OF THE INTERIOR TO SELECT FROM THE LANDS OF THE UNITED STATES NEAREST TO THE LINES OF SECTION ABOVE SPECIFIED, IN ALTERNATE SECTIONS, OR PARTS THEREOF, SO MUCH PUBLIC LAND OF THE UNITED STATES, NOT MINERAL, AS SHALL BE EQUAL IN AMOUNT TO SUCH LANDS AS THE UNITED STATES HAVE SOLD OR OTHERWISE APPROPRIATED, or to which the rights of pre-emption or homestead settlement may have attached as aforesaid, which land thus selected in lieu of those sold, reserved or otherwise appropriated, or to which the right of pre-emption or homestead settlement may have attached, as aforesaid, together with the sections and parts of sections, designated as aforesaid, and appropriated as aforesaid, shall be held and disposed of by

the said state for the uses and purposes aforesaid. PROVIDED, THAT THE LAND TO BE SO SELECTED SHALL IN NO CASE BE LOCATED FARTHER THAN TWENTY MILES FROM THE LINES OF SAID ROAD. And, provided further, that the lands shall be exclusively applied in the construction of and shall be disposed of only as the work progresses through the same, as in this act hereinafter provided. Provided, also, that no part of the land granted by this act shall be applied to aid in the construction of any railroad or part thereof for the construction of which any previous grant of land may have been made by Congress. And, provided further, that any and all lands heretofore reserved to the United States by an act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States, from the operation of this act."

On the 7th day of May, 1864, the grant of May 5, 1864 (supra), being vested in the Lake Superior & Mississippi Railroad Company, said company on that date filed with the Commissioner of the General Land Office a map or diagram showing the general route of its road from St. Paul to a point on Lake Superior, in the NE¼, Sec. 19, T. 51 N., R. 12 W., (Map Record p. 42), and on May 26, 1864, the Commissioner of the General Land Office transmitted a letter to the Register and Receiver of the United States Land Office at Duluth, of which the following is a copy:

"General Land Office, May 26, 1864.

Register and Receiver,

Duluth, Minnesota.

Gentlemen:

By the act approved May 5, 1864, a grant of lands was made to the State of Minnesota to aid in the construction of a railroad from St. Paul to Lake Superior. The Secretary of the Interior having approved of a withdrawal of lands for said road, you will suspend from pre-emption, settlement and sale, a body of lands about twenty miles in width, as indicated on the enclosed diagram "A" marked "Lake Superior and Mississippi Railroad."

Acknowledge the date of receipt of this.

Very Respectfully Your Ob't Servant,

J. M. EDMONDS,

Commissioner.'

On July 13, 1866 (14 Stat. at L. p. 93), Congress passed an act to amend "An Act making a grant of lands to the State of Minnesota to aid in the construction of the railroad from St. Paul to Lake Superior," approved May 5, 1864, which is as follows:

"That Section One of the act entitled, "An Act making a grant of Lands to the State of Minnesota to aid in the construction of the railroad from Saint Paul to Lake Superior," approved May 5, 1864, be amended by adding thereto the following: Provided, further, that in case it shall appear, when the line of the Lake Superior and Mississippi Railroad is definitely located, that the quantity of land intended to be granted by the said act in aid of the construction of the railroad shall be deficient by reason of the line

thereof running near the boundary line of the State of Minnesota, the said company shall be entitled to take from such other public lands of the United States within thirty miles of the west line of said road such amount of lands as shall make up such deficiency, Provided, that the same shall be taken in alternate odd sections as provided for in this act."

On September 25, 1866, the Lake Superior & Mississippi Railroad Company filed in the office of the Commissioner of the General Land Office a map showing the definite location of its railroad from St. Paul to Duluth at the head of Lake Superior (see map Record p. 42); that thereafter the Commissioner of the General Land Office, marked and designated upon the plats of his office the ten-mile, or place limits of said grant; the twenty, or indemnity limits of said grant, and also the thirty-mile limits on the west side of the line of road. On November 2, 1866, the Commissioner of the General Land Office, with the approval of the Secretary, transmitted to the Register and Receiver of the local office at Duluth, a letter, of which the following is a copy:

"DEPARTMENT OF THE INTERIOR,
General Land Office,
Washington, D. C., Nov. 2, 1866.

Register and Receiver,
Duluth, Minn.

Gentlemen:

Herewith is a diagram showing the line of route as definitely located, of the Lake Superior & Mississippi Railroad, with the ten, twenty and on the west side of the thirty-mile limits indicated thereon, act May 5, 1864, and July 13, 1866. The odd sections

within all three of these limits will be withdrawn from sale or location, pre-emption or homestead; except in so far as valid pre-emption claims may have accrued to the same, prior to the withdrawal of May 26, 1864, within the limits therein designated, and prior to the receipt of this order, outside of the limits fixed in that withdrawal. As the act of 1864, reserves from the grant any and all lands theretofore reserved, for the purpose of aiding in any object of internal improvement or for any other purpose whatsoever, no reserved lands are subject to the opeartion of the grant. You will mark the line of route with the several limits on the township plat in pencil and you will report the fact of its having been done.

The railroad company will be required, first, to make their selections from the 10 and 20-mile limits, if it is then found that a deficiency exists, the same can be made up by selections from the 30-mile limits. This order will take effect from the date of its receipt, at your office, and you will advise me of the precise time it may be received by you.

Very respectfully,

Your Obedient Servant,

JOS. W. WILSON,

Commissioner."

The act of July 13, 1866, being simply an enlargement of the act of May 5, 1864, should be so construed as though the amendment was part of the original act, and to be held to pass the title to the grantee, as against the United States, and against all persons not having acquired that title previous to the amendment. The title to the increased quantity of lands, must, with the exceptions men-

tioned, be deemed to have passed to the State of Minnesota at the date of the original act.

On July 2, 1864, Congress approved of an act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the Northern Route, the quantity of lands granted was:

> "Every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile, on each side of said railroad whenever it passes through any state," * * and whenever prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections.

On May 31, 1870, by joint resolution, Congress extended the indemnity limits of the Northern Pacific Railroad Company within ten miles on each side of the railroad, beyond the limits prescribed in said charter.

The limits then, of the Northern Pacific Railroad Company's grant, including its indemnity limits within the State of Minnesota, would be forty miles on each side of the center line of its road, or eighty miles in width. It

would cover to that extent the grant to the State of Minnesota, under date of May 5, 1864, as with a blanket, and the lands in such over-lapping limits, by reason of the prior grant to the State of Minnesota, and the withdrawals for the benefit of Lake Superior & Mississippi Railroad Company, its beneficiary, dated May 26, 1864, and Nov. 2, 1866, would all be excepted from the grant to the Northern Pacific Railroad Company, and would not pass under that grant to the railroad company, and if indemnity was allowed for such loss, it could only be had within the first indemnity of said grant, and therefore the selection of the land in controversy in the second indemnity could not have been legally selected, and was unauthorized and void. The evidence in this case shows that the land for which indemnity was sought, was within the limits of the grant for the L. S. & M. R. R. Co., and was patented to the State of Minnesota for the benefit of the L. S. & M. R. R. Co. and conveyed by the state to it. The Northern Pacific Railroad Co. crossed the grant of the L. S. & M. R. .R Co. at this point nearly at right angles, the place limits of the Northern Pacific grant on the north was beyond the line of the general route of the L. S. & M. R. R. Co. The base land was within the place limits of the grant to the Northern Pacific Railroad Co. as well as within the indemnity limits of the L. S. & M. R. R. Co. and included within the withdrawal on the definite location of said road. Lands thus situated were excluded from the grant to the Northern Pacific Railroad Co. by Section Three of said act, and no indemnity could be had for such loss, but should be charged to the Northern Pacific Railroad Company under this provision of Section Three of said act.

"Provided, That if said route shall be found upon the line of any other railroad route to aid in the con-

struction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act."

I claim that all the lands within the place and indemnity limits of the L. S. & M. R. R. Co., together with all the lands included in the withdrawals of May 26, 1864, and Nov. 2, 1866, were excepted, and excluded from the grant to the N. P. R. Co.

It will be conceded that if the base land was lost to the Northern Pacific Railroad Company, prior to the date of its grant, the indemnity for such loss must be had within the first indemnity limits of said road; for it is so declared in the third section of the granting act of July 2, 1864, in which it is said that,

> "Whenever prior to said time, any of said sections, or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

The joint resolution of May 31, 1870, which provided for a second indemnity limit, states that in the event of there not being in any state of territory in which the railroad may be located the amount of land per mile granted by Congress to said company within the limits prescribed by its charter,

"Then said company shall be entitled to receive so many sections of land belonging to the United States, and designated by odd numbers, in such state or territory within ten miles on each side of said road beyond the limits prescribed in said charter, as will make up said deficiency, except mineral, and other lands as excepted in the charter of said company of 1864, to the amount of lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of SUBSEQUENT TO THE PASSAGE OF THE ACT OF JULY 2, 1864."

The question here to be determined is, was the base land lost to the grant to the Northern Pacific Railroad Co. prior, or subsequent, to July 2, 1864? It appears that on May 5, 1864, Congress approved of an act, granting to the State of Minnesota, aid in the construction of a railroad from St. Paul to Lake Superior—a copy of said act has been heretofore referred to. That on May 7, 1864, the L. S. & M. R. R. Co., the beneficiary of said act filed its map of its general route, and on May 26, 1864, the Commissioner made an order, withdrawing lands on each side of the line of general route of said road, a distance of twenty miles. On July 13, 1866, Congress passed an act amending said act of May 5, 1864, and after the map of the line of definite location had been filed, on November 2, 1866, issued another order of withdrawal. The base land was included within the lines of both of these withdrawals. As the act of July 13, 1866, should be construed as if it were a part of the original act, and the withdrawal would be "in pari materia" to it, the base land was lost prior to the grant to the Northern Pacific R. R. Co., and loss, if any,

should be sought within the first indemnity limits of said road.

The Northern Pacific R. R. Co. v. Musser, Sauntry Land Logging & Mfg. Co., 168 U. S. 596 (L. ed.) is in point.

The facts in that case were as follows: On June 3, 1856, Congress made a grant to the State of Wisconsin, to aid in the construction of a railroad of every alternate section of land designated by odd numbers, for six sections in width, on each side of the line, with the right to select indemnity within 15-mile limits. The line of this road was definitely fixed September 20, 1858. This grant was enlarged by the act of May 5, 1864, to one of ten alternate sections on each side per mile with indemnity limits extending to 20 miles from the line of the road. The Chicago, St. Paul, Minneapolis & Omaha Railway Co., one of the defendants, became the beneficiary of this grant. The road was afterwards constructed and the land in controversy was more than 15 but less than 20 miles from the line of definite location and construction. In March, 1866, the lands within the indemnity limits named in the act of 1864, were by the Secretary of the Interior withdrawn from sale and notice thereof given to the local officers. This withdrawal remained unrescinded and unaltered until 1889. In 1883, the defendant railroad company selected the lands in controversy in lieu of lands lost in its place limits. These selections were approved by the local land officers and transmitted to the Commissioner of the General Land Office for his approval. In the same year the State of Wisconsin issued patents for the land to that company, which thereafter sold and conveyed them to the grantors of its co-defendants, the land, logging and manufacturing company. On a readjustment of the land grant the railway company's title failed and thereafter the

grantee of the railway company purchased them, pursuant to the act of March 3, 1887. On the other hand, the Northern Pacific Railroad Company, on July 2, 1864, received a grant from Congress. The third section of the act making this grant contains a description of the lands granted. (See supra). On August 13, 1870, a withdrawal of the lands within 20 miles was ordered in aid of the grant. On July 6, 1882, the Northern Pacific Railroad Company definitely fixed that portion of its line opposite these lands. They were within the limits of the above mentioned withdrawal, and also within the place limits of the Northern Pacific grant. As those limits were adjusted and fixed according to the map of definite location. Relying upon the title acquired by this grant, and the proceedings had thereunder, the Northern Pacific Railroad Company brought suit to recover the same. Upon the facts above stated the Court said:

> "But a single question is presented in this case, and that is whether the withdrawal from sale by the land department in March, 1866, of lands within the indemnity limits of the grant of 1856 and 1864, excepted such lands from the operation of this grant to the plaintiff. It will be perceived that the grant in aid of the defendant railway company was prior in date to that to the plaintiff, and that before the time of the filing of plaintiff's maps of general route and definite location the lands were withdrawn for the benefit of the defendant. The grant to the plaintiff was only of lands to which the United States had "full title, not reserved, sold, granted or otherwise appropriated and free from pre-emption, or other claims or rights at the time the line of said road is definitely fixed."

The withdrawal by the Secretary in aid of the grant to the State of Wisconsin was valid and operated to withdraw the odd numbered sections within its limits from disposal by the land officials of the government, under the general land laws. The act of the Secretary was in effect a reservation. Walcott v. Des Moines Nav. & R. R. Co., 72 U. S. 689; Wolsey v. Chapman, 101 U. S. 915, and cases cited in the opinion. It has also been held that such a withdrawal is effective against claims arising under subsequent railroad land grants. St. Paul & Pacific R. R. Co. v. Northern Pacific R. R. Co., 139 U. S. (L. ed.) 77-84; Wisconsin Central R. R. Co. v. Forsythe, 159 U. S. 71-74 (L. ed.); Spencer v. McDougal, 159 U. S. 71-74 (L. ed.). * * *

But beyond the significance of the word "reserved," alone, there are other words in the act which, taken in connection with it, make it clear that these lands do not fall within the grant. "Otherwise appropriated" is one term of description, and evidently when the withdrawal was made in 1866, it was an appropriation of these lands so far as might be necessary for satisfying that particular grant. It is true it was not a final appropriation or an absolute passage of title to the state or railway company, for that was contingent upon things thereafter to happen, first, the construction of the road, and, second, the necessity of resorting to those lands for supplying deficiencies in the lands in place; still it was an appropriation for the purpose of supplying any such deficiencies. Again, in the description, the the words, "free from pre-emption or other claims or rights." Certainly, after this withdrawal the Wisconsin Company had the right, if its necessities required by reason of a failure of lands

in place, to come into the indemnity limits and select other lands. Can it be said that they were free from such right when the very purpose of the withdrawal was to make possible the exercise of the right? But the language is not simply "free from rights," but "free from claims," and surely the defendant railway company had an existing claim. No one can read this entire description without being impressed with the fact that Congress meant that only such lands should pass to the Northern Pacific as were public lands in the fullest sense of the term, and free from all reservations and appropriations and all rights or claims in behalf of any individual or corporation at the time of the definite location of its road. Northern Pacific Railroad Co. v. Saunders, 166 U. S. 620. And such is the general rule in respect to railroad land grants.
* * *

In United States v. Southern Pacific Railroad Co., 146 U. S. 1091-1101 (l. ed.), it was said: "Indeed, the intent of Conress in all railroad land grants, as has been understood and declared by this court again and again, is that such grant shall operate at a fixed time, and shall take only such lands as at that time are public lands."

The withdrawal of May 26, 1864, and that of November 2, 1866, was made in favor of an earlier land grant, and made prior to the filing of the map of definite location by a company having a latter grant, the latter having such words of exception and limitations as are found in the grant to the Northern Pacific R. R. Co., the withdrawal operates to except the withdrawn lands from the scope of such latter grant.

When the definite line of a land grant railroad is established, the grant takes effect upon the sections granted by relation as of the date of the act of Congress. The grant is one in presenti. It cuts off all other claims, others than those mentioned to any portion of the lands from the date of the act, and passes the title as fully as though the selections had been capable of identification. When the L. S. & M. R. R. Co. was definitely located it supplanted the Northern Pacific Railroad Co. not only as to granted, but also as to indemnity lands at the point of intersection. This was absolutely necessary to give effect to the proviso. If the lands in the indemnity belt of the L. S. & M. R. R. Co., were not subject to the grant to the Northern Pacific Railroad Co. at the time the latter grant took effect, then no change in their condition afterwards could bring them within the operation of that grant. All grants of this description are strictly construed against the grantees; nothing passes but what is conveyed in clear and explicit language. This is the law as declared in the case of the United States v. Southern Pacific R. R. Co., 146 U. S. 1092 (l. ed.), in which the Court said:

> "When the specific tracts were designated by the filing of the map of definite location, the title to the land attached as of the date of the grant. If anything in the land laws of the United States can be considered as thoroughly settled by repeated decisions it is this. It matters not when the map of definite location of the Southern Pacific was filed and approved. Whether before or after the date of the definite location of the Atlantic and Pacific Railroad Company, or when filed the grant could take effect by relation only as of March 3, 1871, and at that time, and for nearly five years

theretofore, the title to these lands had been in the Atlantic & Pacific."

The grant to the Atlantic & Pacific R. R. Co. was made in 1866, to the Southern Pacific in 1871. The map of definite location of the Atlantic & Pacific was filed April 11, 1872, then the specific tracts were designated, and to them the title of the Atlantic & Pacific attached as of the date of its grant, July 27, 1866.

In the third section of the granting act of the Northern Pacific Railroad Company appears the following:

> "Provided, that if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act."

What was the intention of Congress in enacting this paragraph, and inserting the same within the third section of the organic act, for it is the intent of Congress we must seek, however difficult it may be to discover the same. The grant to the Northern Pacific, including its indemnity limits, would make a strip of land 80 miles in width, in a state and 120 miles in the territories. It could make no difference whether this strip of land ran parallel to the grant to the L. S. & M. R. R. Co. or crossed the same at right angles. If the Northern Pacific was on the same general line the entire distance of the L. S. & M. R. R. Co. and overlapped its granted and indemnity limits then under the terms of this provision, all the lands within the granted limits of the Northern Pacific which overlapped the grant to the L. S. & M. R. R. Co. would be deducted.

In other words, charged to the Northern Pacific for which no indemnity would be allowed to that company, the same result would follow, if the Northern Pacific should cross the L. S. & M. R. R. Co., the lands within the overlapping limits of said grant should be deducted—and no indemnity for its loss would under this provision be allowed.

The construction of all acts in favor of a corporation is to be construed strictly as against the corporation, nothing is to be taken by implication, that which is not clearly expressed, is not granted. The intention of Congress in the enactment of this provision was clearly to prevent the granting of aid in the construction of the Northern Pacific Railroad Co., which would allow that company to take within its place limits any lands which had been granted before to some other railroad, or to seek indemnity for said loss within its indemnity limits. Otherwise Congress would be making a double grant. Congress having granted aid to one road intended if a subsequent grant was made to another railroad, all lands within the prior grant should be deducted from the subsequent grant, for which no indemnity for its loss should be had.

This question has been determined by the Supreme Court of the United States in the case of the United States v. Southern Pacific R. R. Co., 146 U. S. 1091-1101 (l. ed.) The charter of the Southern Pacific R. R. Co., so far as this provision is concerned, is the same as that in the Northern Pacific charter The Court, speaking of this provision, says:

> "That proviso may not be technically and strictly applicable to this case, in that a road crossing another may perhaps not be said to be found upon the line of such other road, or to be on the same general

line, YET THE IMPORT OF THIS PROVISO IS CLEAR, to the effect that Congress was not intending to give to one company that which it had already given to another, but intended that lands previously granted should be definitely excepted from the latter grant."

If this is the law, then all the lands that were granted to the State of Minnesota by act of Congress of May 5, 1864, and July 13, 1866, including the lands withdrawn for its benefit embraced within the order of May 26, 1864, and November 2, 1866, that are within the overlapping limits of the Northern Pacific, should be deducted from the amount of lands granted to that company.

The bases upon which the land in controversy rests falls within this provision. The base land passed to the state as belonging to its grant. It was selected by the L. S. & M. R. R. Co. and patented to it by the state, it was within the place limits of the grant to the Northern Pacific Railroad Co. and within the overlapping limits of the Northern Pacific R. R. Co., and under the provision of the statute above mentioned should have been deducted from the amount of land granted to the Northern Pacific R. R. Co. and no indemnity for its loss allowed.

This course was not adopted, but the Northern Pacific treating this tract of land as lost to its grant, because selected by and patented to the L. S. & M. R. R. Co., selected this land in controversy in lieu thereof, such selection could not legally be made.

The act of May, 1864, provides that lands reserved for any purpose within the limits of its grant shall be excepted therefrom; but indemnity for its loss may be obtained. The act also provided that in case of loss, indem-

nity shall be sought by selection of land nearest to the line of sections granted. The L. S. & M. R. R. Co. could not select state swamp land, because it was reserved, it was of such a character that it was required to pass it by, and select indemnity for its loss in the next tract that met the requirements. The Northern Pacific subsequently came along gleaning in the same field, and selects indemnity for the same swamp land that the L. S. & M. R. R. Co. had prior to that received indemnity for its loss, when under the provisions of the law as before cited nothing of the kind should have been allowed.

I claim that under the provisions of its charter the Northern Pacific Railway Company could not legally select within the indemnity limits of its grant land in lieu of any claimed to have been lost within its overlapping limits of the grant to the State of Minnesota of May 5, 1864.

In Winona & St. Peter R. R. Co. vs. Barney, 113 U. S. 1109, the Supreme Court of the United States construed a provision of an act of Congress approved March 3, 1865, amending an act of 1857, which increased the grant under the original act of 1857 from 6 to 10 sections and provided that all lands located within the extension of the grant by the act of 1865, which may have been granted for the purpose of aiding in the construction of any railroad should be deducted from the full quantity of land granted by the act of 1865. The court held that the reservation of lands within the four sections granted by the act of Congress of 1865, was only a legislative declaration of that which the law would have pronounced independently of it, as previous grants of the same property would necessarily be excluded from subsequent ones. The same principle would apply to the proviso in the third section of the

act of July 2, 1864, to aid in the construction of the Northern Pacific Railroad Company.

The only way in which force could be given to the proviso in Section 3 of the act of July 2, 1864, was to hold that the indemnity lands of the Lake Superior & Mississippi Railroad Company under the act of Congress of May 5, 1864, were exempt from the grant of the Northern Pacific Railroad Company, for if not exempt the former company's prospective right of selection would be to that extent impaired. When the Lake Superior & Mississippi Railroad Company definitely located its line, it not only supplanted the Northern Pacific Railroad Company as to its granted but also as to its indemnity lands at the point of intersection. This was absolutely necessary to give proper effect to the proviso.

We therefore insist that by the act of Congress of July 2, 1864, granting aid in the construction of the Northern Pacific Railroad Company under the provision in the third section of said act, the land lost for which the indemnity is claimed was of the character which was to be deducted from the quantity of land granted to said company for which no indemnity could be obtained.

If this is not correct, then the land claimed to have been lost within the granted limits of the Northern Pacific Railroad Company was lost prior to the date of its grant, and if indemnity is to be sought for its loss then such indemnity should be found within the first indemnity limits of its grant.

THE ACT OF JULY 1, 1898.

It is claimed by the complainant, that Jones, the purchaser of this land, is protected in his title under the provisions of the act of July 1, 1898, which provides:

> "That where, prior to January 1, 1898, the whole or any part of an odd-numbered section in either the granted or the indemnity limits of the land grant to the Northern Pacific Railroad Company, to which the right of the grantee or its lawful successor, *is claimed to have attached by definite location or selection, has been purchased directly* from the United States, or settled upon or claimed in good faith by any qualified settler under color of title or claim of right under any law of the United States, or any ruling of the Interior Department, and where purchaser, settler or claimant refuses to transfer his entry as hereinafter provided, the railroad grantee, or its successor in interest, upon a proper relinquishment thereof, shall be entitled to select, in lieu of the land relinquished, an equal quantity of public lands, surveyed or unsurveyed, * * * situated within any State or Territory into which said railroad grant extends, and patents shall issue for the lands so selected as though they had been originally granted."

What was the intention of Congress in the passage of this act; for when the intent is ascertained, it is to control its interpretation. The act is to receive such a construction, as will carry out the intent of Congress, however difficult it might be to give full effect to the language used. The object of all interpretation is to ascertain the intent of the lawmakers; to get at the meaning which they wish their language to convey. Courts are to accord a

meaning, if possible, to every word in a statute. The admitted rules of statutory construction declare that a legislature is presumed to have used no superflous words. In putting a construction upon any statute every part must be regarded, and must be so expounded, if practicable, as to give some effect to every part of it, and where a given construction would make a word redundant, it was reason for rejecting such construction. No words are to be treated as surplusage or as repetition. The phrases in this act of the words, "purchased directly from the United States," or "settled upon," or "claimed in good faith," or by "color of title," or by " claim of right," must therefore each have some distinctive meaning. We are seeking for the intention of Congress, and to discover that we may also look at the paramount object which Congress had in view, in the passage of this act, as well as the means by which it proposed to accomplish that object.

In the case of Humbird v. Avery, 110 Fed. Rept., p. 465, Judge Lochren, in speaking of the act of July 1, 1898, said:

> "The obvious purpose of this act was to provide a certain, speedy and equitable way in which all controversies between the railroad grantee, or its successors, and purchasers or settlers upon odd-numbered sections within the place or indemnity limits of the land grant who claimed by color of any law of the United States, or any ruling of the Land Department, should be settled and adjusted, without contest or litigation, either in the Land Department, or in the courts, the railway company by its express acceptance of the act became bound by its provisions, and obligated to carry out its terms. * * *

"The situation at the time of the passage of the act of July 1, 1898, was this: By reason of the erroneous ruling of the Secretary of the Interior as to the location of the eastern terminus of said railroad, *and his revocation of his prior approval* of lawful selections by the railroad company of indemnity lands, and permitting sales and entries of such selected lands, as unappropriated, he had introduced confusion and conflict in respect to the right to such lands, which was beginning to be litigated in the courts; as the suits which resulted in the supreme court decisions above cited had then been commenced, and very much litigation seemed probable. The fact that patents had issued in a few instances would not end such disputes as to the lands so patented, as the courts would adjudge the patentee in any case to hold the title in trust for the other party, wherever the other party had clearly the right to the land. The quieting of claims and titles to such a vast area of land, was matter of public concern, and it was proper and beneficent legislation on the part of congress to thus provide for the settlement and ending, with the full consent and through the voluntary action of the parties in each instance. * * * Complainants' contention that the act of July 1, 1898, only applies to lands claimed by "settlers" cannot be maintained. The language employed is broad enough to include all purchases from the United States, under any law, or ruling of the Land Department."

In the case of Humbird v. Avery, 195 U. S. 286-295 (L. ed.), Mr. Justice Harlan, in delivering the opinion of the court, said:

"Obviously, the first inquiry should be as to the object and scope of the act of 1898. Upon that point we do not think any doubt can be entertained, if the words of the act be interpreted in the light of the situation as it actually was at the date of its passage. Here were vast bodies of land, the right and title to which was in dispute between a railroad company holding a grant of public lands, and occupants and purchasers, both sides claiming under the United States. The disputes had arisen out of conflicting orders or rulings of the Land Department, and it became the duty of the government to remove the difficulties which had come upon the parties in consequence of such orders. The settlement of those disputes was therefore, as the circuit court said, a matter of public concern. If the disputes were not accommodated, the litigation in relation to the lands, would become vexatious, extending over many years and causing great embarrassment. In the light of that situation Congress passed the act of 1898, which opened up a way for an adjustment upon principles that it deemed just and consistent with the rights of all concerned, the government, the railroad grantee and individual claimants. The railroad company evinced its approval of this action of the legislative department by a prompt acceptance of the act in its entirety. By such unqualified acceptance the railroad company agreed that, so far as it had any claim to the lands in dispute, whatever the act of Congress required to be done might be done."

Viewed in the light of these decisions, can there be any question but that the intention of congress in the en-

actment of this law was to protect all claimants to land within the disputed territory, who prior to January 1, 1898, claimed such land under any law of the United States, or any ruling of the Secretary of the Interior. The right to the benefit of the act was fixed at the date when in good faith Jones made his claim to the land. The decision of the Land Department that none are entitled to the benefits of this act except a purchaser whose entry is completed by payment prior to January 1, 1898, or a "settler" on the land prior to that date, is a construction altogether too narrow. It not only violates the fundamental rules of statutory construction, but leaves open to litigation a vast number of disputed claims that it was the intention of Congress by this act otherwise to dispose of. The regulations issued to facilitate the adjustment by the land department of conflicting claims to lands within the limits of the grant to the Northern Pacific Railroad Company under the act of July 1, 1898 (28 L. D. 103); and the construction placed upon the act by the land department, as to who were the the beneficiaries under the act is stated in paragraph 1, on page 105, in which the Secretary of the Interior said:

> "The act designates a class of beneficiaries whose status is that of claimants adverse to the Northern Pacific Railroad Company or its successor in interest, and in doing so, different words and terms of description are used in different portions of the act, but considering the act in its entirety, and giving due recognition to each provision therein, this class embraces any qualified person who, prior to January 1, 1898, by settlement, entry or purchase, initiated in good faith a claim to lands of the description given "under

color of title or claim of right under any law of the United States, or any ruling of the Interior Department," and who is still maintaining such claim conformably to such law or ruling."

Subdivision C, paragraph 8, under the head of "What are the claims which come within the provisions of this act?" is answered:

"An individual claim adverse to the railroad claim is one which prior to January 1, 1898, was initiated in good faith by some qualified person, by settlement, entry or purchase "under color of title or claim of right under any law of the United States or any ruling of the Interior Department, * * * and which is still maintained conformably to such law or ruling, and is one which, in the absence of the railroad claim, could be perfected into full title."

In Jones v. Northern Pacific Railway Company, (34 L. D. 105), will be found the decision of the Secretary in this case, I quote all that was said by him in reference to the act of July 1, 1898:

"The application of Jones initiated no right as against the company, and his purchase no claim which can be recognized by the land department, unless it is protected by the provisions of the act of July 1, 1898, and this question involves consideration of the fifth and last specification of error on appeal.

If Jones had purchased this land from the United States prior to January 1, 1898, or if he had prior to that time made an entry thereof within the meaning of the act of July 1, 1898, he is entitled to an adjust-

ment thereunder. It is believed he has done neither of these things, while the application to purchase was presented prior to the date named, proof and payment were not made until after that date. There was no purchase until the money was paid. There was therefore no purchase prior to January 1, 1898. But it is contended that the application of Jones was the equivalent of an entry. No vested right is acquired by a timber and stone application, while such an application, if presented in accordance with law and for land subject thereto, reserves the land from other disposition by the land department, no right is initiated as against the government, and prior to the submission and acceptance of final proof and the payment of the purchase price, the Secretary of the Interior may suspend the same from disposition and sale under the public land laws. This was precisely what was done in this case. The tract was withdrawn from entry by the order of February 28, 1898, and the purchase of Jones, allowed in violation of that order, initiated no right falling within the remedial provisions of the act of July 1, 1898."

By this we find that all the Secretary deemed necessary to say with reference to the act of July 1, 1898, was, that if Jones had completed his purchase by payment prior to January 1, 1898, or had settled upon the land prior to that time, he would be entitled to an adjustment thereunder. No reasoning advanced why Jones should be thus limited—only a bare assertion of the fact. No construction of the act is given.

The Secretary states that this tract was withdrawn from entry by the order of February 28, 1898, 26 L. D. 265; the order referred to states:

> "While entry of these lands will not be allowed during this suspension, yet in all cases where entries have been allowed, the parties will be permitted to complete the same by making proof thereon, but the issue of patent will be suspended until such judicial determination."

Jones having applied for this land December 17, 1997, he would come within the exception in this order of suspension. This order, however, was modified by instructions from the land department dated April 4, 1898 (26 L. D. 488), being in response to a telegram from the register of the Duluth land office, of which the following is a copy:

> "Will this office, after taking proof in homestead entry, timber and stone entry, heretofore allowed, accept payment, issue final receipts and final certificates? Referring to suspended Northern Pacific land east of Duluth."

In answer to which the department says:

> "It is not the intention of this department to require of these entry men that they make payment at the time of their offer of proof, due to pendency in the courts of the question as to the legality of the company's claim to these lands, but where the money is tendered the usual final receipt and certificate will be issued if the proof is otherwise regular and satisfactory; but upon the final certificate issued by the

register, and the duplicate final receipt given to the entry men, will be noted, in red ink, across the face of each, the following: "This receipt (or certificate) is issued under the order of the Secretary of the Interior dated February 28, 1898, subject to any claim the Northern Pacific Railroad Company may have to the land herein described."

It thus appears that so far as this land is concerned, it was not affected by the order of February 28, 1898. The act of July 1, 1898, rendered the endorsement on the face of the receipt in red ink of no importance. The application of Jones made December 17, 1897, was the initiation of his claim to the land, and was one which, in the absence of the railroad claim, could be perfected into full title. The land was open for sale when Jones tendered his application. He had done all that he could do to perfect his right to the title of the United States. He has a legal right in this case to be preferred when the sale is made, against all others asserting a similar right under the law. It is not within the power of the Secretary arbitrarily to destroy a title, initiated under any of the land laws of the United States, but that is what he has endeavored to do in this case.

The act of July 1, 1898, was prepared by the agents of the Northern Pacific Railroad Company, and in its interest, and through its efforts it became a law. It is not necessary to show our respect for Congress by affecting to be ignorant that legislation of this kind is generally procured upon the solicitation of parties interested.

The bill was introduced in Congress January 21st, 1898, after the denial by the department of an application

of the Northern Pacific Railroad (December 13, 1897, 25 L. D. 501) for the suspension from entry, and patent the remaining undisposed lands in the odd-numbered sections within that part of the formerly recognized limits of the grant to said company lying east of the terminus established by department decision of August 26, 1896.

The order of February 28, 1898 (26 L. D. 265), was based on a petition of the Northern Pacific Railroad Company, dated January 20, 1898, for a reconsideration of the decision of December 13, 1897, above referred to.

It also appears that the United States, September 3, 1897 (26 L. D. 265), had commenced action against the Northern Pacific Railroad Company in the Circuit Court of the United States for the District of Minnesota to secure a judicial determination by the courts as to the eastern terminus of said road.

The Doherty case in the lower courts of Wisconsin had passed against the claim of said railroad company. A large number of suits had been instituted by the Northern Pacific Railroad Company in Minnesota, North Dakota, Montana and Washington. It was a general mixup, and this law was enacted, having for its underlying principle the quieting of disputes respecting the title to lands within the Northern Pacific land grant, and protecting settlers and other claimants under the public land laws from the claims and suits of the company.

The department was so confident as to the correctness of its decision on the question of the initial point, or eastern terminus of the Northern Pacific Railroad Company, that it resisted all efforts of the company in its desire for a suspension of entry of these lands; prior to

this the lands had been restored to the public domain. The lands were applied for by persons duly qualified, some of the lands passed to patent, other were purchased prior to January 1, 1898. While a large quantity of the lands unfit for cultivation, but valuable for its timber were applied for under the timber and stone law, and by reason of contest or other conflicting claims thereon, the applications were not acted upon prior to the order of suspension February 28, 1898.

It is not very consoling at this late date to be informed by the department that applicants in this class of cases have no such claim to the land as merits particular consideration by the departmnet.

The act of July 1, 1898, is not like any of the general land laws. It was passed for a particular purpose. If the courts had sustained the Secretary as to the eastern terminus, or decided that as against claimants for lands within the indemnity limits, that the Northern Pcaific Railroad Company had no title thereto (which the courts subsequently have done) without some law like that of 1898, the rights of the company might have been seriously affected.

The Northern Pacific Railway Company would never have consented to the act of July 1st, 1898, without it had previously considered its benefits. Under the act of July 1st, 1898, the company would be benefited whichever way the decision went. The simple fact that the land is upon an odd-numbered section within the granted or indemnity limit of the grant, and that it has been purchased, settled upon, or claimed, and the purchaser, settler or claimant, elects to hold his claim, would authorize the railroad company under the act of July 1st, 1898, to relin-

quish and select other lands. It would make no difference whether the selection by the company was good or bad, the jurisdiction of the department is not to determine the validity of the title acquired by such selection, there is no provision for a determination to be made under the act, of the company's right to the land. If, by the decision of the Secretary, the claimant's right to the land is denied, the company obtains title to the land. If the claimant's title is held valid, the company is in condition to receive valuable lieu land for the same. If the company's selection is held invalid for other causes another selection can be made. The Northern Pacific Railroad Company cannot lose in any event.

In this controversy, after all has been said, the simple fact remains, that the department, by an order dated August 27, 1896, fixed the eastern terminus of the Northern Pacific Railroad Company at Duluth, restored to the public domain all lands lying east of that place, which had been formerly selected by that company, and invited the entry of the same, refusing to suspend action until the question of the terminus could be judicially determined, allowing qualified persons to spend their money and labor in the endeavor to acquire title to a small tract, and after the court has subsequently determined the question of the terminus adverse to the rulings of the Secretary, by a strict construction of an act passed for the benefit of there persons, declare that by their applications to enter, made upon the invitation of the secretary, they have acuqired no rights to the land that the department was bound to espect.

Con such a conclusion be just? Would such action be considered honorable between man and man?

Is it not contrary to the spirit of the following paragraph in the opinion of the Supreme Court in the case of Humbird vs. Avery, 195 U. S. 286. Speaking of the act of July 1st, 1898, the Court said:

> "The dispute had arisen out of conflicting orders, or rulings, of the land department, and it became the duty of the government to remove the difficulties which had come upon the parties in consequence of such orders."

It must not be understood from what has been said, as a reflection in any way upon the department. The decision in the Eaton case (33 L. D. 426), follows logically from its interpretation of the law. After quoting from the act of July 1st, 1898, the Secretary says:

> "But two classes of individual claims are here described. First, those resting on a purchase didectly from the United States, and second, where the land has been settled upon or claimed in good faith by any qualified settler under color of title or claim of right under any law of the United States or any ruling of the Interior Department."

In this statement is classed as referring to one subject.

> "Land that has been settled upon, or claimed in good faith by any qualified settler under color of title or claim of right under any law of the United States or any ruling of the Interior Department."

We insist that the act of July 1, 1898, refers distinctly to three classes of persons who are beneficiaries under this act:

1st. A purchaser.

2nd. A settler.

3rd. A claimant.

The third clause "or claimed in good faith by any qualified settler under color of title, or claim of right under any law of the United States, or any ruling of the Interior Department," does not mean that the person making the claim must actually reside on the land; if this had been the intention of the act, the words would be mere surplusage. A settler had already been named, and the word settler in the act was used in a general sense, including any kind of settlement on the land; the word qualified settler, as used in the act means any person who makes a claim to the land having the qualifications of a settler, for no other person can acquire title to land under the general land laws, he must be a citizen, possessing the qualifications of a settler.

The words, claim and claimant, appear frequently in the act of July 1st, 1898; also, in the opinion of the Supreme Court in the case of Humbird vs. Avery (supra). These words are also used in the circular approved by the department of date February 14th, 1899, regulating the adjustment under this act. (28 L. D. 103), and in these regulations, the words claimed, and claimants, are used as distinct and separate from purchaser or settler. A claim is the assertion of the right of ownership. A claimant is the person who asserts that right. The act, as interpreted by the department, gives no force or effect to these words.

It is the duty of the officer having in charge the construction of a law, to effect the intention of the legislature, this intention is to be found from the words which

the legislature has employed in conveying it. If the legislature has made a plain provision, without exceptions, no exceptions can be made.

A law is the best exposition of itself, every part of the act is to be taken into view for the purpose of discovering what was in the mind of the legislature, when this has been found, it is to be enforced according to its obvious meaning.

It is a cardinal rule of statutory construction, that significance, and effect should, if possible, be accorded to every word, and that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each. In the construction of a statute the intention of the lawmaker is to be deduced from the whole statute, and every material part of the same. If the words of a statute are doubtful, or obscure, the intention of the legislature is to be resorted to in order to find the meaning of the words. We are not to look at any single phase of a statute, but to the whole scope, in order to arrive at the intention of the makers of it. There is no better way of discovering the true meaning of a law, where there are expressions in it which are rendered ambiguous in their connection with other clauses, than by considering the necessity for it, and the causes which induced the legislature to pass it. A statute ought upon the whole to be so construed that if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant. This act should be construed so as to effectuate the object which congress had primarily in view. I claimed that these rules of construction have been violated by the department in the decision of this case, I contend that the whole scope of the act,

when considered, includes claims for land such as is represented in this case.

THE ORDER OF JULY 9, 1896, HOLDING FOR CANCELLATION THE PRELIMINARY SELECTIONS, THERETOFORE MADE BY THE NORTHERN PACIFIC R. R. CO. THE DECISION OF THE SECRETARY OF THE INTERIOR DATED AUGUST 27, 1896 (23 L. D. 204), FIXING THE EASTERN TERMINUS OF THE NORTHERN PACIFIC R. R. CO. AT DULUTH, AND THE ORDER OF MARCH 22, 1897, CANCELLING THE SELECTIONS OF LAND LYING EAST OF DULUTH.

It will be noticed that prior to the decision of the Secretary dated August 27, 1896, fixing the eastern terminus of the grant to the Northern Pacific R. R. Co. at Duluth, the Land Department by its order of July 9, 1896, held for cancellation, the preliminary selections of said company to all lands lying east of Duluth. That after the decision of August 27, 1896, another order was made on March 22, 1897, finally cancelling said selections. It would appear that there were two questions involved in these orders: First, the order cancelling the selections, and, second, the decision of the Secretary as to the eastern terminus of said railroad. The first was a question of fact, the second may be considered a question of law and fact. The land in controversy is within the second indemnity limits of the grant to the Northern Pacific Railroad Company. The authority to select the same must be found in the Joint Resolution of Congress dated May 31, 1870.

That resolution declares that the company "shall be entitled under the direction of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such state or territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency. "The selection of said land by said company was merely preliminary. There was no approval by the land department prior to the completion of Jones' entry. The Secretary not only by his order cancelled these selections, but restored the land to the public domain, and declared it subject to disposal in the same manner as other public lands. This order was not revoked until after Jones had applied for the land and completed his entry by payment. There was nothing said about the cancellation by the Secretary of these selections either in the case of Doherty v. Northern Pacific R. Co., 177 U. S. (l. ed.) 830, or in United States v. Northern Pacific R. Co., 177 U. S. (l. ed.) 836. Those cases simply decided that the eastern terminus of the Northern Pacific Railroad Co. was at Ashland, Wis., instead of Duluth, Minn. The Secretary of the Interior was simply in error as to that question—but it did not follow that because he erred in judgment as to that question the order of cancellation was also void. That was a matter in which he alone had jurisdiction. It was exclusively within his control. The Northern Pacific Railroad Company could obtain indemnity only through the Secretary of the Interior, for the resolution provides that the company shall receive under the direction of the Secretary, so many sections as will make up such deficiency. The cancellation of the selections was within the scope of the authority of the Secretary, and on questions of this kind his decision is generally

conclusive everywhere, even in a court of justice, nor can it be reversed or corrected in a collateral proceeding between private parties. The Secretary must pass upon many questions, previous to the approval of selections. His judgment upon these matters is that of a special tribunal, and is unassailable except in direct proceedings for its annulment. When the law has confined to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others. The railroad company had no vested right in these selections, the Secretary acted within the scope of his authority—the selections were in fact cancelled, and the land restored to the public domain. Whether the cancellation was right or wrong it was beyond the power of collateral attack, in controversy between private parties.

The Northern Pacific Railroad Co. claim to have made its selection of this land October 17, 1883, more than 23 years ago. There is no valid reason why, if said railroad company was entitled to this land, it should not have been awarded to it years ago. It is in evidence in this case that on a sale of the lands granted in aid of the construction of this road, to enforce the payment of the several mortgages given by said Northern Pacific Railroad Co. to the Farmers' Loan & Trust Co., that 38,000,000 acres were disposed of to the Northern Pacific Railway Co. Why is it that the legal title to this enormous quantity of land is still held by the government, that this land grant has not before this been adjusted, and the lands to which the company should have a title passed to it, and it required to bear its equal proportion of taxes, as land owned by private individuals. It is well known that no

patents are issued to said railroad without its requests and experience has shown that the holder of unproductive real estate is poor, and the more he owns the poorer he is. One thus situated will use his best endeavors to dispose of the same, shifting this burden on the shoulders of others, but as long as the government will hold these lands in trust for the railroad, and thus the company escapes the burdens that would arise from the ownesrhip of the same, just so long will the title be allowed to remain in that condition, awaiting the increased value from the labor of others, and the settlement of the country.

The remarks of the court in St. Paul, etc., R. R. Co. v. Winona R. R. Co., 112 U. S. (l. ed.) 872-876 are appropriate here:

> "Was there a vested right in this company, during all this time, to have, not only these lands but all the other odd sections within the twenty-mile limits on each side of the line of the road, awaits its pleasure? Had the settlers in that populous region no right to buy of the government because the company might choose to take them, or might after all this delay, find out that they were necessary to make up deficiencies in other quarters? How long were such lands to be withheld from market and withdrawn from taxation and forbidden to cultivation?"

The Northern Pacific Railroad Co. has no vested right in said land. It has only the right of selection, and having no other right, is bound to exercise that right with reasonable diligence.

In Sjoli v. Dreschel, 199 U. S. (l. ed.) 564, the court said:

> "That no rights to lands within indemnity limits will attach in favor of the railroad company until after selections made by it with the approval of the Secretary of the Interior. That up to the time such approval is given lands within indemnity limits, although embraced by the company's list of selections, are subject to be disposed by the United States, or to be settled upon and occupied under the pre-emption and homestead laws of the United States; and that the Secretary has no authority to withdraw from sale or settlement lands that are within indemnity limits which have not been previously selected, with his approval, to supply deficiencies within the place limits of the company's road. * * * The result of the cases in this court is that the railroad company did not acquire an interest in any particular lands within the indemnity limits merely by filing its lists of selection, nor until its selections were approved by the Secretary of the Interior. * * * The mere filing of its lists of selections of indemnity lands did not have the effect to exclude them from occupancy under the pre-emption or homestead laws. On the contrary, notwithstanding the filing of such lists they remained open, as before, to settlement or occupancy under those laws, until the selections were formerly approved by the Secretary of the Interior, and the lands withdrawn from settlement or sale."

The attorney general of the United States (35 L. D. 77) comes to the relief of the Land Department, with an opinion as to the construction to be given to this decision

of the Supreme Court. The Secretary says that he is not inclined to give to that decision the broad effect indicated if it can be avoided, and therefore submits the question, whether the Land Department is bound to follow the broad principles quoted from such decision, or whether the same should be construed with due regard to the particular facts set forth before the court, and limited accordingly. It was the opinion of the Attorney General, that the Land Department was not bound to follow the broad language used in that case, but may confine what is said in the Sjoli case to a state of facts in any other case similar to it.

This is a singular opinion, the Attorney General attempts to construe a decision of the Supreme Court, that is plain in its meaning, and needs no construction. He is simply giving his opinion as to how the Supreme Court should have decided, not what it did decide. He overlooks the fact that the court in the Sjoli case said:

> "That no rights to land within the indemnity limits will attach in favor of the railroad company until after selections made by it with the approval of the Secretary of the Interior.
>
> "That up to the time such approval is given, lands in the indemnity limits, although embraced by the company's list of selection, ARE SUBJECT TO BE DISPOSED OF BY THE UNITED STATES, or to be settled upon and occupied under the pre-emption and homestead laws of the United States."

How does the United States dispose of its land? The disposition of land belonging to the United States are disposed of in accordance with its land laws. The decision refers to a condition of things existing after the prelimin-

ary selection had been filed. It was after such filing that the court held that land could be disposed of up to the date of the approval of such selection. If no rights to land within the indemnity limits will attach in favor of the railroad company until after selections made by it with the approval of the Secretary of the Interior, it follows logically that up to such approval the lands belonging to the United States, are unappropriated and subject to entry the same as any other public lands.

UNDER THE ACT OF JULY 2, 1864, THE NORTHERN PACIFIC RAILROAD COMPANY WAS LIMITED TO TEN ALTERNATE SECTIONS OF LAND PER MILE ON EACH SIDE OF ITS RAILROAD, WHENEVER IT PASSES THROUGH A STATE.

Section 3 of the act of July 2, 1864, enacts that there be, and hereby is granted to the Northern Pacific Railroad Company:

> "Ten alternate sections of land per mile on each side of said railroad whenever it passes through a state."

It also provided an indemnity limit of not more than ten miles beyond the limits of said alternate sections, for the selection of an equal quantity of land that had been disposed of by the government within the place limits of its grant, when the line of its road had been definitely fixed. Beyond these lateral limits the company could not seek indemnity. The intention of Congress in making this

grant was not only to have this road constructed but that the burden of its construction should fall equally on each side of the road, for each side would be equally benefited. If, on fixing the line of the definite location, it was found that lands had been "granted, sold, reserved, occupied by homestead settlers, or pre-emptied, or otherwise disposed of," other lands should be selected by said company in alternate sections and designated by odd numbers not more than ten miles beyond the limits of the alternate sections. The act provided that this ten-mile limit should be on each side of the railroad line. The grant of July 2, 1864, to the Northern Pacific Railroad Company, was ten alternate sections of land per mile on each side of the railroad line whenever it passes through a state. The language is plain, no construction of its meaning or the intention of Congress in using those words is necessary. It was not a grant of twenty sections of land per mile, or a permission to take 15 sections per mile on one side and five on the other, as might suit the convenience of the company. The grant to the Northern Pacific Railroad Company was not one of quantity, but for a certain number of sections in place, and if not found, then the company were allowed to look for the deficiency in other restricted limits, but such selection must be made of lands on the same side of the road, that the lands lost to its grant were situated.

If the company does not get its full amount of lands within its primary limits, and fails to make up its loss within its secondary limits on the same side of the line of its road in which the loss occurred, then it is a barren right. It is the happening of a contingency plainly contemplated in the granting act, subject to which the company made its contract.

If there were only nine sections of lands per mile sub-

ject to appropriation by the company within its place limits on the south side of its road, at the time of the definite location of its road, the company would have a right to select on the south side of its road one section of land within its first indemnity limits, not more than ten miles beyond the granted limits, if the land could not be found within the first indemnity limits, and the loss to the grant was subsequent to its grant and prior to its definite location, then under the joint resolution of May 31, 1870, the company could go into the second indemnity limits to make up the deficiency, but it must be on the same side of the road the loss occurred.

I am aware that this rule has not been observed by the department in allowing the selections for deficiency by this railroad company. It has been, and at the present time is, the practice of the Land Department to allow the Northern Pacific Railroad Company to roam anywhere within the lateral limits of its grant, and select land as indemnity—without regard to its location on the one side or the other of its line of road. That the department is in error in the allowance of such selections, I refer to the decision of the United States Circuit Court in the case of the United States v. Burlington & Missouri River R. R. Co., 4 Dillon 287, and afterwards affirmed in the Supreme Court of the United States, 98 U. S. (l. ed.) 198.

The syllabus in the case in the Circuit Court of the United States—the opinion in that case being delivered by Mr. Justice Miller, one of the justices of the Supreme Court of the United States—is as follows:

> "There was no authority in the grant to issue patents for land on the north side of the defendant's road, in lieu of lands deficient on the south side of its

road, and such patents are void. But, in a bill to have such patents declared null the lands must be described or identified."

By Section 18 of the act of Congress of July 2, 1864 (13 Stat. at Large 356), amending the act of 1862 (12 Stat. at Large 489), To aid in the construction of a Railroad and Telegraph line from the Missouri River to the Pacific Ocean and to secure to the Government the use of the same for Postal, Military and other purposes." The Burlington and Missouri River Railroad Company, an existing corporation under the laws of Iowa was authorized to extend its road through the Territory of Nebraska, etc.

Section 19 of the act is as follows:

"That for the purpose of aiding in the construction of said road, there be, and hereby is, granted to the said Burlington and Missouri River R. R. Co. every alternate section of public land (excepting mineral lands as provided in this act) designated by odd numbers, to the amount of ten alternate sections per mile on each side of said road, on the line thereof, and not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed."

With the exception that this railroad had no lateral indemnity limits, the grant was similar to that in aid of the construction of the Northern Pacific Railroad Company. The United States brought its action to vacate and declare void the patents issued for certain lands on the north side of said road selected for indemnity for an equal

amount of land lost to its grant on the south side of its road. On this question Mr. Justice Miller, speaking for the court, said:

> "It is alleged that 150,000 acres of land lying on the north side of defendant's road, has been patented in lieu of lands found deficient on the south side of said road, and that the patents so issued are void. I am of opinion that the act of Congress did not intend to grant twenty sections per mile for the road, but ten sections per mile on each side of the road, that no right to take more on either side of the road than what amounted to ten sections per mile on that side, was conferred. If, for any reason, the required number of sections could not be found on one side, it was as in the case of similar deficiency in the twenty-mile limits of the other road, a loss which congress had made no provision to supply. *There existed therefore no power in the office of the Land Department to issue patents for lands on the north side for those not found on the south side.*" If the lands so patented can be identified I think that the government is entitled to have a declaration that as to these the patent conveys no title."

The case was appealed to the Supreme Court of the United States, and is found reported in the 98 U. S. (l. ed.) 198. Mr. Justice Field delivered the opinion of the court, on this subject he said:

> "It only remains to notice the further objections to the patents, that lands to the amount of 150,000 acres on the north side of the road is included in them in lieu of land deficient on the south side. It is true, the act of Congress contemplates that one-half of the

land granted should be taken on each side of the road; and that the department could not enlarge the quantity on one side to make up a deficiency on the other, but the answer to the objection as presented by the bill, either in its original form or as amended, is that it is not shown what this land was, and the patents can not be adjudged invalid as to any land not identified; so as to be capable of being separated; nor can any decision go against the company for its value without such identification. It is possible that the land to which the company was entitled is not so described in the patents that it can be separated from that which should not have been patented. If such be the fact, the government may be without remedy."

The case of the Southern Pacific R. R. Co. v. Smith and others, decided May 18, 1896, and reported in 74 Fed. Rept. p. 588, is on all fours with this case which we are now considering. The lands in controversy in that suit was patented to defendant Smith, and the Southern Pacific R. R. Co. claimed to be entitled to them by virtue of a congressional grant, and brought its suit to obtain a decree that the title conveyed by the patent is held in trust for it, and to compel the conveyance thereof to the complainant, and to enjoin the defendants from asserting any title to the lands.

The terms of the grant under which the complainant claims, are to be found in an act entitled, "An Act granting lands to aid in the construction of a railroad and telegraph line from the states of Missouri and Arkansas to the Pacific coast (14 Stat. at L. p. 292). The third section of this act is an exact copy of the third section of the act of July 2, 1864, by which the Northern Pacific Railroad Company was incorporated. So far as applicable to

the present case, it was a grant of every alternate section of public land, not mineral, designated by odd numbers, to the amount of 10 alternate sections per mile on each side of the road to which the United States should have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time such route should be designated by a plat thereof, filed in the office of the commissioner of the general land office; and where, prior to that time, any of the sections or parts of sections should be granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, the act provided that other lands should "be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, designated by odd numbers, not more than ten miles beyond the limits of said alternate sections." It appears that the line of definite location of said road was fixed April 3, 1871, and on April 21, 1871, the commissioner of the general land office, by direction of the Secretary of the Interior withdrew the odd numbered sections of land within 30 miles of the railroad line from sale, location, pre-emption, or homestead entry, which order of withdrawal has ever since continued in force and effect, the railroad was thereafter constructed and fully equipped, and was accepted and approved.

On October 3, 1887, the complainant filed its indemnity list No. 25 in the proper land office within which district the lands in controversy were situated, describing the tracts in controversy as selected by the complainant in lieu of the lands lost to complainant, the indemnity list was in due form. The filing of the list of selection by the railroad company was prior to a settlement or entry of the lands by defendant Smith, his application for said

land having been made December 7, 1887, more than two months after the filing of the list of selection by the railroad company. When the railroad company filed its list of selections, the land in controversy was vacant and unappropriated, to which the United States had full title. The lands lost to the railroad company were situated on the north side of its road as definitely located and constructed, while the lieu lands were situated on the south side of said railroad line, defendant Smith made a preemption filing, which is similar to a timber and stone application.

From these facts the court said:

> "The lands in controversy are within 30 miles of, but more than 20 miles from, the road as definitely located and constructed, and, if vacant and unappropriated, were subject to be taken as authorized by the law, to make good losses sustained by the complainant within the primary limits of its grant. Complainant attempted to select these lands, which are situated on the south side of its road, on October 3, 1887, in lieu of lands situated on the north side thereof, within the primary limits of its grant, and which were lost to complainant, by including them in a list filed on that day in the proper local land office, in the form and accompanied by the certificates, affidavits, and fees required by law. This was prior to any attempt at settlement on, or entry of, the lands by the defendant Smith; his settlement, which was the basis of the patent subsequently issued to him, having been made December 7, 1887. * * *
>
> The land in controversy being within the indemnity limits of the complainant's grant, and being, at

the time of the complainant's attempted selection of them, vacant and unappropriated, to which the United States had full title—and not falling within any of the exceptions of the grant, and the complainant having done all in its power to select them by filing in the proper office its claim to them in due form, accompanied by the affidavits and certificates required by law, and paying the proper fees, I think it clear that it is entitled to maintain the present bill unless it be, as contended on the part of the defendants, that indemnity lands on one side of the road can not be selected to make good losses sustained by the complainant on the other side. That they can not is, I think, in effect, held by the Supreme Court in the case of U. S. v. Burlington & Missouri River R. R. Co., 98 U. S. 334-342. On the authority of that case, a decree will be entered sustaining the plea and dismissing the bill."

The land involved in this controversy is the SW¼ of SE¼, Section 7, T. 54 N., R. 14 W. It was selected by the Northern Pacific Railroad Company as indemnity for lands in Sec. 11, T. 46 N., R. 16 W. The lost land is south of the line of road, while the selected land is north of said line of railroad. If the decision in the case of the Southern Pacific R. R. Co. v. Smith (supra) is good law, and it must be considered as such, as the Southern Pacific R. R. Co. appears to have acquiesced in the same, then under the rulings of that case and that of the Burlington case the complainant in this case should on this question alone be entitled to a decree of this court in his favor.

The act of Congress of July 2, 1864, creating the Northern Pacific Railroad Company and granting it aid for the purpose of the construction of a railroad from Lake Superior to Puget Sound under the provisions of Section 4 of said Act (13 Stat. at L. 368), enacted, "That whenever said 'Northern Pacific Railroad Company,' shall have 25 consecutive miles of any portion of said railroad and telegraph line ready for service completed, the president of the United States shall appoint three commissioners to examine the same, and if it shall appear that 25 consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the president of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situate opposite to and coterminous with, said completed section of said road; and, from time to time, whenever 25 additional consecutive miles shall have been constructed, completed and ready as aforesaid and verified by said commissioners to the president of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every 25 miles of said road is completed as aforesaid."

By this section, the Northern Pacific Railroad Company was divided into sections of 25 miles for adjustment, and the railroad company would have no claim or right to any land not embraced within the 25 miles of road that had not been certified and completed as specified in this provision of the act, and no legal selection of indemnity for lands lost within the place limits of its grant could be selected unless the lost land was within some completed section of the 25 miles, and the land selected in lieu thereof was also

within the some completed portion of the road. Can there be any question about the correctness of this proposition?

The Northern Pacific Railroad Company began the construction of its road in 1871, at a point in Section 1, Tp. 48 N., R. 17 W., upon the definite line of its route and continued westerly on that line. The map of the general route of said road was filed with the Commissioner of the eneral Land Office August 13, 1870. The red line on the map attached to this brief indicates the line of the general route of said road from Sec. 1, Tp. 48 N., R. 17 W., Minnesota to the Montreal river, the dividing line between Wisconsin and Michigan. On the 6th of July, 1882, the Northern Pacific Railroad Company filed its map of definite location of its road from Sec. 1, Tp. 48 N., R. 17 W., easterly to Ashland, Wisconsin. The definite line of location diverges materially from the line of general route. This line of definite location is indicated by the black line on the map in the record of this case (Record page 122). Sec. 1, Tp. 48, N., R. 17 W., is at a point called Thomson Junction. From that point to Bluff Creek in Superior, Wisconsin, at a point in Sec. 32, Tp. 49 N., R. 13 W., is 25 miles from Thomson Junction, on September 19, 1882, a map of this 25 miles of constructed road from Thomson Junction to Superior was filed in the Land Department, and a diagram showing the 20, 30 and 40-mile limits of the grant opposite said constructed road adjusted to the line of definite location was prepared by the Commissioner and filed in his office. The eastern terminus of the 25 miles from Thomson Junction is indicated by the line shaded yellow on the map (Record page 122). It was this 25 miles within which the Northern Pacific Railroad Company should have selected its lands on its list of selections October 17, 1883, at that date the eastern terminus of the

Northern Pacific Railroad Company was not further east than Sec. 32, Tp. 49 N., R. 13 W., which was at Superior. In 1887 the railroad was completed to Ashland, Wisconsin, and was certified as completed and accepted by the president of the United States in that year. All east of the line shaded yellow on the map (Record p. 122) which indicates the lateral limits eastwardly of the 25 miles from Thomson Junction and embraces all the lands in controversy in the litigation, has no foundation to base selections for indemnity for lands lost prior to October 17, 1883. I contend that as the eastern terminus of the road was on October 17, 1883, at Superior, there was therefore no authority to make a diagram embracing land east of that point, and all the lands embraced in this fan shape diagram which was at that time coterminous with the uncompleted portion of the road were not subject to selection, and therefore the lands selected at that date were not subject to selection, and thus the selections made at that date were void. If I am not correct in this legal proposition, I would like to have some one point out the error. If I am correct then all the lands falling within this fan shape diagram were not on October 17, 1883, subject to selection by the railroad company, and therefore it has no claim to the same.

It would therefore be incumbent upon one defending title to land claimed under such selection, to offer evidence showing the completion of the road, the appointment of commissioners, their reports and the acceptance of such report by the president of the United States. The filing of a selection list by the Northern Pacific Railroad Company within this land was shown to be selected in lieu of lands lost within the place limits of its grant, would be no evidence standing alone of the right of said company to select said land.

THE NORTHERN PACIFIC RAILWAY COMPANY IS NOT THE SUCCESSOR OF THE NORTHERN PACIFIC RAILROAD COMPANY.

There is no evidence in this case that the Northern Pacific Railway Company is the successor of the Northern Pacific Railroad Company. This is a fact to be established by evidence, not assumed to exist by reason of the assertion of the fact by the Northern Pacific Railway Company. The act of July 2, 1864, incorporating the Northern Pacific Railroad Company, was in the nature of an agreement, wherein the United States was one of the parties, and the Northern Pacific Railroad Company was the other. This agreement could not be changed or modified in any material respect without the consent of both parties. The grant to that company of 50,000,000 acres of the public domain, to aid in its construction, was on compliance with certain conditions on the part of the railroad company. The United States was not only interested in having this road constructed, but it was concerned in many other ways, for the performance of which, on the part of the railroad company, it reserved to itself the right at any time to add to, alter, amend, or repeal this act. That is expressed in Sec. 20 of said act, which reads as follows:

> "That the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefit of the same for postal, military and other purposes, Congress may, at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter, amend, or repeal this act."

The interest of the United States in this road was not to end on the completion of the same, there was no limit to the time when the rights of the government should cease; it was to continue as long as "grass grows, and water runs." It can not be said that the interest of the government in this road was ended, when the stock and bondholders of this road deemed it to their interest to change the terms and conditions of the original charter, without the consent of Congress.

After the completion of this railroad in 1887, a scheme for its sale was advocated. An agreement having been made with certain of its bondholders, and the Great Northern Railroad Co. required that the mortgages given by the Northern Pacific Railroad Company, to the Farmers Loan & Trust Co. should be foreclosed. It also contemplated placing the road in the hands of receivers. The action of the receivers caused trouble with its employes, which was designed to depreciate the value of the property of said road. To more perfectly carry out this scheme, it became necessary to resurrect the defunct Superior & St. Croix R. R. Co. and breathe into it the breath of life. This was done by the Legislature of Wisconsin April 15, 1895. This railroad was not only to purchase the personal property but also the land granted to the Northern Pacific Railroad Company, and after such purchase, these bondholders were to issue the bonds of this new road, in the amount, and for the purpose stated in the agreement between them, and the Great Northern Railroad Co. Such agreement is referred to in the case of Pearsall v. Great Northern Railroad Co., 161 U. S. (l. ed.) 838. The decision in that case (which was rendered March 30, 1896), upset this scheme, and another one was devised. On April 8, 1896, only six days after that decision, Senator Mitchell

fo Oregon, introduced in the senate the following joint resolution:

> "To facilitate the re-organization of the Northern Pacific Railroad Company; to secure to actual settlers the right to purchase at a price not exceeding $2.50 per acre the agricultural lands within its grant, and to prohibit said company or any successor company from giving by consolidation, sale, or other corporate action, control of its railroad to any corporation, company, person, or association of persons owning, operating, or controlling parallel or competing railroad; which was read the first and second time by unanimous consent and referred to the committee on the judiciary."

On April 21, 1896, the committee on the judiciary reported the joint resolution with amendments, and submitted a report, a part of which reads as follows:

> "The purpose of this proposed legislation may be stated in a few words. It has been made to appear to your committee that the land grant and other property of the Northern Pacific Railroad Company, all of which is covered by mortgage liens, will at a very early date be sold under foreclosure proceedings. This joint resolution, should it become a law, will enable the purchaser, at such foreclosure sale, upon filing in the office of the Secretary of the Interior a copy of the deed or deeds conveying to them said property, together with a certificate signed by a majority of them, setting forth the name adopted by them, the names, number and residence, respectively, of the directors of the proposed new company, and a copy of any plan of re-organization adopted

by said purchasers, or pursuant to which such purchase shall have been made, to re-organize under the name specified in such certificate, so that they, their associates, successors and assigns shall have and be inveted with all the estate, right, title and interest of such purchasers, in and to such railroad and property, and shall possess franchise, rights and powers, the same as the Northern Pacific Railroad Company now possesses; such new company to be subject to all the obligations and duties imposed by Congress upon the Northern Pacific Railroad Company. * * * The resolution also provides that nothing in it coutained shall be construed as making any addtiional grant of lands to such successor corporation, or as a waiver of any right of the United States now existing to enforce any forfeiture of lands heretofoer granted to the said Northern Pacific Railroad Company, or as in any manner affecting the vested rights of any settler or settlers on any of the lands heretofore granted to the Northern Pacific Railroad Co. or any purchaser or purchasers of such lands from said company. The right to alter, amend, or repeal this resolution is also by express terms reserved to congress."

On January 23, 1897, the joint resolution came before the senate for action, objection being made to its consideration, the joint resolution was not acted upon, nothing further was done by Congress.

On July 1, 1896, the corporate name of the Superior & St. Croix Railroad Co. was changed to "Northern Pacific Railway Co.," which name was adopted as the corporate name of the Superior & St. Croix Railroad Co.

These proceedings in the senate abundantly show that those interested in this scheme to dispose of the property and effects of the Northern Pacific Railroad Company, realized that they must in some way obtain the consent of Congress, before they could legally take action, when, however, that consent could not be had, they proceeded on the theory that title to this property would pass without the assent of Congress. The change in the name of the Superior & St. Croix Railroad Company to that of the Northern Pacific Railway Co., and the purchase of the property, real and personal, of the Northern Pacific Railroad Company, had, they believed, the effect to create that company the successor of the Northern Pacific Railroad Company, whether Congress was disposed to consent to the change or not.

If the Northern Pacific Railway Company is the successor of the Northern Pacific Railroad Company, then that company must be the predecessor of the Northern Pacific Railway Company. This we know is not the fact, the Northern Pacific Railroad Co. exists today. Congress could add to, alter, amend or repeal the act of 1864, if it should repeal it, the lands granted to the company and still undisposed of would return to the public domain. With such authority still existing, which we all must admit, how can the Northern Pacific Railway Company be the successor of a living corporation.

The defendants rely upon a decision of the Secretary of the Interior (29 L. D. 316) in a case of the Northern Pacific Railway Co., under the act of July 1, 1898, which holds that upon the examination of copies of certain deeds, it is found that the Northern Pacific Railway Co. is the successor of the Northern Pacific Railroad Co and that finding the defendants claim is conclusive; that the Secre-

tary found from this evidence that the Northern Pacific Railway Company was the successor of the Northern Pacific Railroad Co. is no more astonishing than the assertion on the part of the defendants that such finding is conclusive. The law which the Secretary was in that case construing, has an express provision with reference to this matter of succession. It was a legal question, not a matter of fact that had to be decided. The act of July 1, 1898, provides:

> "That nothing herein contained shall be construed as intended, or having the effect, to recognize the Northern Pacific Railway Company as the lawful successor of the Northern Pacific Railroad Company, in the ownership of the lands granted by the United States to the Northern Pacific Railroad Company, under and by virtue of foreclosure proceedings against said Northern Pacific Railroad Company, in the courts of the United States, BUT THE LEGAL QUESTION whether the said Northern Pacific Co. is such lawful successor of the said Northern Pacific Railroad Company, should the question be raised, shall be determined wholly without reference to the provisions of this act."

We raise the question of successorship here, are we bound by the decision of the Secretary, as contended by the defendants the proposition is absurd.

The Northern Pacific Railway Co., in compliance with the laws of Wisconsin, under which it was organized, made its first report to the Railroad Commissioner of that state for 10 months ending June 30, 1897. This report was sworn to by the president and treasurer of said company, as being a complete and correct statement, the same was

filed in the office of said commissioner, a copy of which is in evidence in this case.

To certain questions asked, the following answers were given:

1st.—Name of the common carrier making this report? Answer—Northern Pacific Railway Company.

2d.—Date of organization? Answer—1870.

3d.—Under laws of what Government, State or Territory organized? If more than one, name all, give reference to each statute, and all amendments thereof? Answer—Wisconsin; special act approved March 15, 1870; amended January 26, 1871; March 6, 1871, and April 15, 1895; former title Superior & St. Croix Railroad Company, changed to present name by resolution of stockholders and directors in July, 1896.

4th.—If a consolidated company, name the constituent companies? Give reference to charter of each and all amendments of same? Answer—Not a consolidated company.

Without the power conferred by the Joint Resolution of May 31, 1870, the Northern Pacific Railroad Company, would have had no authority to issue its bonds and secure the payment of the same by a mortgage "on its property and rights of property of all descriptions, real, personal and mixed, including its franchise as a corporation." Did those words confer power to convey to its bondholders by way of mortgage, and on foreclosure to transfer to the purchaser an absolute title to all the property of the company, also its franchises, including the franchise of becoming and

being a corporation, so that the purchaser would have the right to organize as such as successor to and substitute for the Northern Pacific Railroad Comapny, precisely as if the act of July 2, 1864, had named them as corporators, and endowed them with corporate faculty. If so, it would involve an assumption of the Northern Pacific Company's obligations as well as an acquisition of its privileges and exemptions. The franchise of being a corporation can not be transferred by any corporate body of its own will, as it is not a subject of sale and transfer.

In the case of the Memphis, etc., R. R. Co. v. Berry, 112 U. S. (l. ed.) 840, in which questions of similar character arose, the court said:

> "The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders, or the purchasers at a foreclosure sale, the sub substantial rights intended to be secured. They acquired the ownership of the railroad, and the property incident to it, and the franchise of maintaining and operating it as such; and the corporate existence is not essential to its use and enjoyment. All the franchises necessary or important to the beneficial use of the railroad could as well be exercised by natural persons. The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corporation belongs to the corporators; while the power and privileges, vested in and to be exercised by the corporate body as such, are the franchises of the corporation. The latter has no power to dispose of the franchise of its members, which may survive in the mere fact of corporate existence, after the corporation has parted with all its property and all its franchises. If, in the

present instance, we suppose that a mortgage and sale of the charter of the railroad company created a new corporation, what has become of the old one? If it abides for the purpose of responding to the obligations not satisfied by the sale, or of owning property not covered by the mortgage or embraced in the sale, as it may well do, and as it must if such debts or property exist, then there will be two corporations coexisting under the same charter. For after an act of disposition which separates the franchise to maintain a railroad and make profit from its use, from the franchise of being a corporation, though a judgment of dissolution may be authorized, yet, until there be such judgment the rights of the corporators and of third persons may require that the corporation be considered as still existing."

The corporation created by the act of July 2, 1864, has never been dissolved and, for all purposes not covered by the mortgage, still maintains an existence as a corporate body, capable of contracting, and of suing and being sued. If this be so, how can the Northern Pacific Railway Company be its successor.

The powers of corporations organized under legislative statutes, are such and such only as those statutes confer. The charter is the measure of its powers, and the enumeration of these powers implies the exclusion of all others. In the construction of such a statute every presumption is against it.

Referring again to Sec. 10 of the act of July 2, 186$\frac{4}{}$, we find this provision, "No mortgage or construction bonds, shall ever be issued by said company on said road; nor mortgage, or lien made in any way, except by the con-

sent of the Congress of the United States." The Joint Resolution of May 31, 1870, authorized the company to "issue its bonds to aid in the construction and equipment of its road and to secure the same by mortgage."

The prohibition with respect to "liens made in any way" was still retained, Congress never consented that liens other than mortgage liens should ever be placed upon the property. In Thomas v. West Jersey R. R. Co., 101 U. S. (l. ed.) 950, the court declared the general principle on this subject to be:

> "That where a corporation like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions which undertakes, WITHOUT THE CONSENT OF THE STATE, to transfer to others the rights and powers conferred by the charter, and relieve the grantees of the burden which it imposes, is a violation of the contract with the state, and is void as against public policy."

In York v. Winans, 58 U. S. (l. ed.) 27, in reply to the argument made by the appellant, that the duties imposed upon it by the charter, are fulfilled by the construction of the road, and that by the alienation of its rights to use, and its power to control and supervise it, they would avoid further responsibility, the court said:

> "But those acts involve an overturn of the relations which the charter has arranged between the corporation and the community. Important franchises were conferred upon the corporation to enable it to

provide the facilities to communication and intercourse, required for the public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided, as a remuneration to the community for their grant. The corporation can not absolve itself from the performance of its obligations WITHOUT THE CONSENT OF THE LEGISLATURE."

It is not claimed that Congress ever gave its consent that the lands within the Northern Pacific Railroad Company's grant lying east of the Missouri river, might be sold to satisfy liens by way of judgments against the company. To hold that such sale can be made without the consent of Congress, and by such sale pass a legal title to the purchaser, is to hold that any act done without authority, makes all its parts valid and the more it is done when forbidden by law the stronger the claim t oits enforcements in the courts.

It may be well to note in passing, that the plaintiff claims, that the power to mortgage conferred upon the company by the Joint Resolution, was exhausted when the first mortgage was given, which was in 1870, when the work of construction was begun. This mortgage was paid. The road was built through Minnesota long before the other mortgages were given, and therefore could not have been executed to secure the payment of bonds issued for the construction and equipment of that portion of the road. Although the lands east of the Missouri river were not effected by or sold on the foreclosure of any mortgage, the order of sequestration was based largely on the deficiency arising from the sale under the decree of foreclosure of the several mortgages that had been subsequently given—all

these subsequent mortgages were executed and delivered without authority of law and were void—and the sale of the real and personal property of the Northern Pacific Railroad Company for that reason conveyed no title to the real and personal property which was the subject of the sale, and was void and of no effect.

In the case of the East Tennessee, etc., R. R. Co. v. Frazier, 139 (l. ed.) 196, the court said:

> "Whatever special rights of mortgage were given by the act of 1847, were exhausted. That special right was to increase its capital by the issue of bonds secured by mortgage to a sum sufficient to complete its road, and stock it with everything to give it full operation. It appears that the road authorized by this charter was completed, equipped and in full operation more than 25 years before the mortgage of 1881, and long before the consolidation of 1869. OF COURSE, WHEN A CHARTER POWER IS ONCE EXHAUSTED IT IS IN RESPECT TO FURTHER CONTRACTS AN DRIGHTS, AS THOUGH IT HAD NEVER BEEN GRANTED."

THE TITLE TO THIS LAND, AT THE DATE OF SALE BY THE SPECIAL MASTER UNDER THE ORDER OF THE COURT, WAS IN THE UNITED STATES, IT WAS NOT AFFECTED BY SUCH PROCEEDINGS.

Sec. 10 of the act of July 2, 1864, expressly prohibited the Northern Pacific Railroad Company "from issuing any mortgage or construction bonds on said road, or

lien made in any way, except by the consent of the Congress of the United States."

On May 31, 1870, Congress passed a joint resolution, which provided among other things:

> "That the Northern Pacific Railroad Company be, and hereby is, authorized to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and description, real, personal and mixed, including its franchise as a corporation. * * * And if the mortgage hereby authorized shall at any time be enforced by foreclosure or other legal proceeding, or the mortgaged lands hereby granted, or any of them, be sold by the trustees to whom such mortgage may be executed, either at its maturity, or for any failure or default of said company under the terms thereof, such lands shall be sold at public sale, at places within the States and Territories in which they shall be situate, after not less than sixty days' previous notice, in single sections or subdivisions thereof to the highest and best bidder."

The land in controversy was not affected by a sale under any mortgage but on an order of sequestration. The joint resolution had only reference to a mortgage, the consent of Congress required to be given by Section 10 of the act of July 2, 1864, referred only to a mortgage, but not to "liens made in any way" by the company upon its property. Congress had a right to make this condition, and the acceptance of this provision by the Northern Pacific Railroad Co. made it effective and binding upon it. This land was sold on a lien created by the court, without the consent of Congress, and the sale of the land did not affect the title to

the same. This land was within the second indemnity limits and at the date of the pretended sale the title to the same was in the United States. The order of sale attempts to carry out the mode and manner of sale as if the lands had been patented to the Northern Pacific Railroad Company, or had been selected by that company and the selections approved by the Secretary of the Interior, but when it came to the sale of lands the selection of which had not been approved, the sale was made in gross, not by sections or subdivisions of sections. It was simply the sale of lands, the legal and equitable title of which was then in the United States. No title could pass to such lands, whatever their situation might be in the future. There was an entire want of authority to dispose of these lands in the manner in which they were sold, and therefore no title passed by such sale. The purpose of this provision in Sec. 10 of the act of July 2, 1864, was at all times to keep the granted lands free from liens for the benefit of the stockholders of the company, and place the land grant beyond the reach of those that might at times have charge of its affairs, and be inclined to exploit the same for their own selfish interest. If the grant was beyond the reach of those that were connected with the management of the Northern Pacific Railroad Co., if the company were prohibited from creating a legal liability in the shape of a lien, it is not clear how such a lien could be made effective by an order of the court in a suit in which neither the United States, nor the stockholders of the company were parties. This provision is the same as if Congress had stated that the land embraced in this grant were exempt from sale under execution of decree. The United States as well as the stockholders are directly interested in the enforcement of this provision. So is the complainant who claims under an

interest in these lands transferred to his grantor by the United States.

On April 27, 1899, there was a decree of the court made and entered in the cause in which the Farmers' Loan & Trust Company were complainant and the Northern Pacific Railroad Company and others were defendants, (Record page 145), in which the prayer of the petitioners being granted it was ordered that all the lands granted by Congress to aid in the construction and equipment of the Northern Pacific Railroad Company, and all the rights of said defendant under the several land grants made to it by Congress in any lands lying within the State of Minnesota, should be sold, the lands to be sold were the lands for which letters patent have been issued to the said Northern Pacific Railroad Company and the right to receive lands for which patents have not issued but which have been selected by and certified to said company these should be sold in single sections or subdivisions.

This decree was vacated by a decree May 25, 1899, (Record page 149), and on that date another decree was made and entered, insofar as the manner and mode of selling these lands were considered it was in the same manner as the decree of April 27, 1899. The special master who disposed of this land under the decree of the court dated May 25, 1899, made his report of his doings (Record page 159), and the manner and mode in which the sale was made, and refers to A. 2, which appears in the record of the case (Record page 163), which the special master states the lands sold in schedule A. 2, were offered for sale and sold in single sections or subdivisions thereof. On September 16, 1899, it appearing to the court from the report of the special master "that he had fully complied with the direc-

tions in said decree as to the sale of said lands," the sale was confirmed.

April 27, 1899. Decree, (Record page 216):

> "All of said lands for which letters patent have been issued to said defendant, the Northern Pacific Railroad Company,, and the right to receive lands for which letters patent have not issued, but which have been selected by and certified to said company, shall be sold in single sections or sub-divisions thereof at the the following places."

May 25, 1899, record 223, another decree was entered upon which the sale of this property was made, states the manner in which this property was to be sold.

The order is the same as in the decree of April 27, 1899.

August 24, 1899, record 233-237, report of special master to the court, on page 237 of the record he says, speaking of the lands sold in St. Louis County:

> "Then and there, pursuant to said decrees offered at public sale the lands described in Schedule A2 hereunto annexed and made a part hereof, except those represented by "item number 390" in said schedule which said offers of said lands were in single sections or subdivisions thereof as represented by each item number.

It is claimed by the complainant that the sale of this land under the decree of the court was void.

It appears in evidence from the report of the special master that his authority to dispose of this land was conferred upon him by a decree of the court, which required

the special master to sell these lands at public auction, and what lands were to be sold and the manner in which they should be sold was specifically mentioned in said decree.

He was to offer for sale:

1st. All the said lands for which letters patent have issued to said defendant, Northern Pacific Railroad Company.

2d. And the right to receive lands for which letters patent have not issued, but which have been selected by and certified to said company.

These two classes of land were to be sold in single sections or subdivisions.

This was the authority conferred upon the special master and the validity of his sale depended upon his conforming thereto.

The only lands that he was authorized to sell, which was included in these two classes, were lands that had been patented to the Northern Pacific Railroad, and lands that had been selected by said company, and its selections had been approved by the Secretary of the Interior.

He was not authorized to sell any lands that were not thus situated.

He was, however, authorized to sell all other lands in which the Northern Pacific Railroad Company claimed an interest, which would embrace lands not included within the two classes of land above referred to and that have not been patented to the railroad company, or its selections had not been approved and certified to the company.

All lands thus situated were to be placed in a separate class and sold in a different manner, to-wit, in a lump.

The sale of these lands was made, according to the report of the special master, on the 17th day of July, 1899, and his report to the court of his proceeding under said decree, and his manner of executing the same, was made August 24, 1899. In said report he says:

> "That I attended at the time and place of sale within said County of St. Louis, specified in said notice, to-wit, on the 17th day of July, 1899, at 4 o'clock p. m., at the Court House in Duluth, St. Louis County, in said State of Minnesota, and then and there, pursuant to said decree, offered at public sale the lands described in Schedule A2, hereunto annexed and made a part hereof, excepting those represented by 'Item number' 390, in said schedule, which said offer of said lands were in single sections or subdivisions thereof as represented by said 'Item number' in said schedule except said number 390."

As the report does not describe the lands sold, but refers to Schedule A2, that schedule or what is claimed by the defendants to be a copy is offered in evidence and made defendants Exhibit 10 (Record pp. 163-175), from which it appears that this land in controversy is therein designated as "Item number 151" (Record 168), and was sold as land that had either been patented to the Northern Pacific Railroad Company, or selected by and certified to said company.

This land did not belong to either of these two classes, and for that reason the special master had no authority to sell the same under the decree.

It appears (Record p. 139) that the United States had on December 19, 1898, sold this land in controversy to

Richard B. Jones. It also appears (Record p. 135 Complainants Exhibit 0), that the selection of this land by the Northern Pacific Railway Company was not approved by the Secretary of the Interior until October 17, 1905.

From this it would appear that this land was not of the character that the special master was authorized to sell in the manner which he did do, the decree conferred upon him his only authority, he had no right to dispose of this land otherwise.

As said in Williamson v. Berry, 8 Howard (l. ed.) 1171:

> "In any sale under a decree or order in chancery, the purchaser, before he pays his money must not only satisfy himself that the title to the property sold is good, but he must take care that the sale has been made according to the decree or order. If he takes under an imperfect sale, he must abide the consequences."

In Milwaukee & Minnesota R. R. Co. v. Soutter, 69 U. S. (l. ed.) 886-898, Mr. Justice Miller, speaking for the Court said:

> It is too clear for argument that a sale by the marshal unauthorized by the decree, is without validity. Does the order confirming the sale made it valid? Upon principle, the question is by no means free from difficulty, we are clear that a sale without a decree to sustain it would be a nullity, and we doubt if the court can make it valid by a mere general order of confirmation."

In Gray v. Brignardella, 68 U. S. (l. ed.) 693-698, the court said:

> "Purchasers at a judicial sale are protected, when the power to make the sale is expressly given, not otherwise. It is only when they buy on the faith of an order of the court which clearly authorizes the act to be done, that the shield of the law is thrown around them. An officer of the court may erroneously suppose that the power to sell is given by a decree; yet, if he does sell, his act is without authority of law and is void."

When a decree specifies the manner in which it must be exercised, it must be followed or the acts done will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise. There can not in this case be any presumptions indulged in to sustain the action of the special master and uphold this sale, for he recites in his report the manner in which he sold the property, and from the recitals it appears that he disregarded the order or decree of the court and did not conform to its directions. That presumptions are not indulged to sustain proceedings of this character are made manifest. Presumptions are indulged to supply the place of that which is not apparent, not to give a new character to that which is seen to be defective, every deed executed under a power must refer to the power. As an independent instrument of the holder of the power it would not convey the interest intended, but if the manner in which the power is exercised is recited, it being proper matter for recital, then the recital is evidence not against a stranger, but against the grantee and parties claiming under him. French v. Edward, 80 U. S. (l. ed.) 702.

The special master recited in his report the manner in which he had exercised the power conferred upon him

by the order or decree, making part of his report schedule A2, and referring to the lands he had sold by items, mentioned in said schedule, among which we find the land in controversy; the Northern Pacific Railway Company, by accepting the conveyance with this solemn declaration of the officer as to the manner in which his power was exercised, would be estopped from denying that the fact was as recited.

If while acting under a valid decree, an officer sells lands not embraced therein, his act is, as to such lands, obviously without any legal support.

Ludlow v. Park, 4 Ohio 5.
Green v. Holt, 76 Mo. 677.

In conducting the sale, the master acts as the agent of the law, his powers as such being derived from the decree, and the order or decree must be strictly pursued. The purchaser is bound by the presumption to know the limits of the master's authority as delegated to him by the decree and purchasing when he transgressed such special authority, he does so at his peril. This is in accordance with the general principles applicable to the law of agency.

Manifestly when the decree requires that the master make the sale under the order of the court, he is imperatively controlled by the requirements thereof, and a sale made in contravention of the decree is ineffectual to bar the title from the judgment debtor to the ostensible purchaser.

Sec. 310 Klebers void Judicial Sales.

Accordingly, in theory of law in a strictly judicial sale the court itself is properly the vendor, and the sale,

insofar as the owner of the property is concerned is an involuntary one. Sec. 2.

From its very nature, a judicial sale is of necessity the result of judicial proceedings, and the order or decree upon which the sale is founded, must expressly direct that the property involved, whether real or personal, be sold, for without such an order there can be no judicial sale within the strict meaning of the term. Sec. 3.

A sheriff, master or other officer, selling property under a process, decree or judgment of the court cannot make a valid agreement with the purchaser to convey any other estate than such as the decree or judgment will warrant.

Ryan v. Dox, 25 Barb. 440.

A sale of land under judgment must be made in the manner prescribed in the judgment.

Bethel v. Bethel, 69 Ky. (6 Brush 65-99). American Dec. 655.

A sale of property in any other manner than that prescribed by law vests no title in the vendee.

Gable v. Martin, 2 Mass. (1 Howard) 558.

But we do not mean to intimate that in any case a sale by a master, or master in chancery, can be valid, when there is no decree to support it, citing Shriver v. Lynn, 2 Howard 43.

Milwaukee and Minn. R. R. v. Soutter, 69 U. S. 898.

Early in 1878 a bill was introduced in Congress to secure to this reorganized company confirmation of title to the property and to all the corporate powers and franchises, "including the franchise to be a corporation," originally conferred upon the Northern Pacific Railroad Company by its federal charter of 1864.

That bill failed of passage. It was never again introduced. A record of the proceeding will be found in the Congressional Record of the 45th Congress, Volume 7, part 3, pages 2690, etc.

THE NORTHERN PACIFIC RAILWAY COMPANY WAS NOT AUTHORIZED BY ITS CHARTER TO PURCHASE, HOLD OR CONVEY THESE LANDS.

The rights of the Northern Pacific Railway Company were conferred upon it by an act of the state of Wisconsin dated March 15, 1870, by which was incorporated the Superior and St. Croix Railroad Company. This act was in effect the same as the one under consideration in the case of Case v. Kelly, 133 U. S. (l. ed.) 513, in which it was held that a railroad had no authority to deal in any lands except only such as was necessary in the conduct of its business as a railroad. The decision in that case, would be the law in this, provided the amendments to the articles of incorporation of the Superior & St. Croix Railroad Company, adopted by the Legislature of the State of Wisconsin, April 15, 1895, were void under the constitution of that state, and the complainant was authorized to raise that objection. The act with the amendments are given in full. (See exhibit "D" attached to the bill of complaint).

It is claimed that Section 8, as amended under which the authority is conferred is void, as controvening not only Section 18 of Article 4, of the constitution of the State of Wisconsin, but of Section 31 of Article 4 of the same instrument.

Section 18, Article 4 of the constitution, is as follows:

> "No private or local bill which may be passed by the Legislature shall embrace more than one subject, and that shall be expressed in the title."

The title of the act was "To incorporate the Superior and St. Croix Railroad Company." The title of the act as amended April 15, 1895, is:

> To amend Chapter 326 of the private and local laws of 1870, entitled "An Act to incorporate the Superior & St. Croix Railroad Company," and Chapter 328, of the private and local laws of 1871, entitled "An Act to amend Sec. 2, Chapter 326, of the private and local laws of 1870, approved March 15, 1870, entitled "An Act to incorporate the Superior & St. Croix Railroad Company."

The title was plain and simple, "To incorporate the Superior & St. Croix Railroad Company." Anything that was germane to this title was authorized under it. The original charter of the Superior & St. Croix Railroad Company was for the construction of a railroad entirely within the State of Wisconsin, and it was authorized to acquire real estate for its right-of-way and for lands that were necessary for its use as such railroad. By Section 8, as amended, the company was authorized to hold and dispose of any lands that the Superior & St. Croix Railroad Company might acquire, by its purchase or otherwise, in any

territory through or in which it shall acquire in any manner, and operate any railroad or railroads where ever such lands may be situated. By this amendment the act has two subjects. First, to incorporate the Superior & St. Croix Railroad Company; second, to buy, sell, or otherwise dispose of, lands within any state through which it may operate any railroad. These two subjects have no connection with each other.

Would we reasonably anticipate finding in the body of an act, the title of which was to incorporate the Superior & St. Croix Railroad Company, a clause giving authority to said corporation to purchase, hold, or dispose of lands without limit? Is such a provision germaine to such a title? The construction of a railroad, and the purchasing and disposing of lands have no rational connection with each other. The only subject mentioned in the title is the incorporation of the Superior & St. Croix Railroad Company. Such an act might contain any provision necessary to carry out that purpose. An act to incorporate the Superior & St. Croix Railroad Company, would apprise neither the legislature, nor the public, that it covered provisions under which an unlimited amount of lands could be purchased by that corporation. The reading of such a title would at once induce the conclusion that the various provisions of the act related alone to the incorporation of said railroad, and the act itself must, therefore, be confined to that subject. The constitutional provision is violated if an act is amended so as to embrace a purpose outside of its title. Whatever amendments are made must be amendments to the organic law, and not independent provisions relating to something else. The constitution has made the title, the index to the legislative intent, as to what shall have operation. The purpose of the adoption

of such a provision in the constitution of the state was that every measure presented for consideration should stand upon its own merits, and that the leigslature should be fairly notified of the design of the act when required to pass upon it. Has the added provision any necessary connection with the subject stated i nthe title, or any connection with the subject treated in the act? By no reasonable construction can the purpose of buying and selling lands be said to be embraced within the title to incorporate the Superior & St. Croix Railroad Company. The section of the constitution prohibiting legislation of this character is a wise and wholesome one, intended to prevent legislators from being entrapped into a careless passage of sections and clauses in bills of which the title give no intimation. The propriety of such an inhibition is apparent to all, and it must be observed and protected by the courts. Titles to legislative acts by reason of these constitutional provisions possess very great importance. It not only requires that the purpose of the law should be correctly indicated, but it absolutely makes the title of the act control, and excludes everything from the effect and operation as law which is incorporated in the body of the act, but is not within the purpose indicated by the title.

Is it probable that the Legislature of Wisconsin, having under consideration the amendments to incorporate the Superior & St. Croix Railroad Company, if it had supposed or been informed that by the adoption of said amendments it was clothing said railroad company with the power to deal in lands, not necessary for its use, that it was conferring upon it a power without limitation, that such provisions would have become a law. The title is not broad but narrow, not general but specific. Under such a title no one would infer, and nobody was bound to imagine

that such vast powers had been conferred upon this corporation to deal in lands in the manner claimed by said company, a provision as to which the title not only did not relate, but by its narrow terms affirmatively, and positively excluded.

Milwaukee Co. v. Isenrig, 109 Wis. 19.
Diana Shooting Club v. Lamoreux, 114 Wis. 44.

Section 31, Article 4 of the constitution of the State of Wisconsin is as follows:

"The Legislature is prohibited from enacting any special or private laws in the following cases: First, for changing the name of persons, or constituting one person the heir at law of another; second, for laying out, opening or altering highways, except in cases of state roads extending into more than one county, and military roads, to aid in the construction of which lands may be granted by Congress; third, for authorizing persons to keep ferries across streams, at points wholly within this state; fourth, for authorizing the sale or mortgage of real or personal property of minors, or others under disability; fifth, for locating or changing any county seat; sixth, for assessment or collection of taxes, or for extending the time for the collection thereof; seventh, for granting corporate powers or privileges, except to cities; eighth, for authorizing the apportionment of any part of the school fund; ninth, for incorporating any town or village, or to amend the charter thereof."

It is contended by the complainant, that under the seventh subdivision of Section 31, the amendments to the

charter incorporating the Superior & St. Croix Railroad Company, adopted by the Legislature on April 15, 1895, are void. It can not be denied that these amendments grant corporate power as well as privileges, and that to a very remarkable extent. The original act of March 15, 1870, contained 22 sections. Of these 12 sections were amended, 7 repealed and 6 new sections added. Under the guise of amendments a new act to incorporate this company was made. New powers, and new privileges were conferred upon it, and these of a very extraordinary character. The act under consideration not only authorized and empowered the "Superior & St. Croix Railroad Company" to construct a railroad within the boundary of the State of Wisconsin, but to extend the construction of said railroad into the several states, and into the dominion of Canada. It could not only build a railroad, but it was authorized to purchase any railroad, or railroads, to buy stock and bonds of any railroad. It may become a dealer in lands, buy and sell the same in the states through which its railroad may pass, and all these powers are conferred upon it, under the act, the title to which is to incorporate the "Superior & St. Croix Railroad Company." That there was no intention by these amendments to carry out the original purpose of the act is apparent by the subsequent action of this company. From March 15, 1870, to July 6, 1896, the Superior & St. Croix Railroad Company, if it had any existence at all, such existence was on paper alone. Not a mile of this road had been constructed, there had been no money raised or effort made towards the construction of this road. The incorporation of the Superior & St. Croix Railroad Company up to July 6, 1896, was only a float, and its only market value was the use it was put to on that date by changing its name to the Northern Pacific Railway Com-

pany, and within six months after this transformation, it was the owner of more than 5,000 miles of tract, and millions of acres of land, with stock and bonds issued by it for more than $300,000,000 without a mile of the road constructed on the line designated in the original act, and all this vast property held under an act to incorporate the Superior & St. Croix Railroad Company. It seems to me that if the amendments to this act adopted April 15, 1895, conferred the powers and privileges to carry on the business in this manner, such powers and privileges clearly fall within the condemnation of the seventh clause of Sec. 31, Article 4 of the contstitution of the State of Wisconsin, and are therefore void.

In the case of Attorney General v. Superior & St. Croix Railroad Company, 93 Wis. 613, the court in speaking of the amendments to the articles of incorporation of this company, said:

> "Whether the provisions of Ch. 244, Laws of 1895, which greatly enlarge the existing rights, privileges and franchises of the company, and confer upon it others of a varied and most comprehensive and highly important character, are void, as being in violation of the seventh clause of the constitutional amendment of 1871 (Art. 4, Sec. 31), forbidding the enactment of "any special or private laws for granting corporate powers or privileges, except to cities," is not presented by the information, so as to become a proper subject for judicial determination and we neither express nor intimate any opinion in respect to these portions of the act."

The matter before the court was a motion by the Attorney General for leave to file an information in the nature

of a quo warranto, the court, however, was of the opinion that so far as the question presented, that the amendments were in conflict with the provision of the constitution referred to, the evidence did not show that the company had acted upon them, but in the case now before the court, those facts are made to appear, by the purchase of the land in controversy by this company and the sale of the same to the defendants in this case. If the act, as amended authorized the Northern Pacific Railway Company to purchase and dispose of lands acquired, it still remains simply a law of the State of Wisconsin. It has no force or effect in the State of Minnesota.

A corporation is not a citizen (only in a qualified sense) of the state in which it is created. It can only act in another state on such conditions as the latter state may see fit to impose. Corporate existence is by universal law regarded as a franchise which can never exist except by positive authority within the state which granted or confirmed its franchise. The strictly legal existence by force of obligatory law of a corporation is confined to the state which created it, and endowed it with its powers, capacities and rights, which it can only exercise in another state by the permission of the legislative power thereof, and when it assumes to act in such state, the enjoyment and exercise of such right must conform to the law or settled policy of that state not prejudicial to its interest, or those of its citizens. The power to take land in a corporate capacity is itself a franchise, the title passes by succession, the changes by death or otherwise among the corporators does not affect its disposition, as it does in private holdings.

The question whether a railroad company organized under the laws of Wisconsin is competent to take title to lands in the State of Minnesota, does not wholly depend

upon the laws of its creation; the laws and public policy of the State of Minnesota, as indicated by its legislature, are material, and important factors to be considered. The Northern Pacific Railway Company owes its existence to the laws of the State of Wisconsin, and the powers and capacities expressed or implied, are such as conferred upon it by its charter. The question therefore is, first, whether the Northern Pacific Railway Company was clothed with authority to purchase these lands within the State of Minnesota, and if so, second, whether the laws or settled policy of Minnesota allowed such purchase. The laws of the State of Minnesota prohibit corporations from holding lands except to a limited extent, Section 5877, General Stat. 1894, as amended by Ch. 129, Laws of 1899, provides:

> "That no corporation other than those organized for the construction or operation of railroads, canals or turnpikes, shall acquire, hold or own over 5,000 acres of land so hereafter acquired in this state; and no railroad, canal or turnpike corporation shall hereafter acquire, hold or own land so hereafter acquired in this state other than may be necessary for the proper operation of its railroad, canal or turnpike, except such lands as may have been granted it it by act of Congress, or the Legislature of this state."

This statute indicates the policy of the state in this regard. Whatever may have been the capacity of the Northern Pacific Railway Company to take, hold and convey lands within the State of Wisconsin, the laws of Minnesota forbids that company, and all other corporation, to take, hold or convey lands in the State of Minnesota, except such as may be necessary for the proper operation of

its road. The complainant, therefore, contends that the title to this land in controversy did not pass to the Northern Pacific Railway Company, and that such road could not transfer any valid title to the same to the defendants.

It may be urged that the limitation upon the power of a corporation to receive land is one which concerns the state alone, that the title to such lands in a corporation can only be defeated by a proceeding in the nature of a quo warranto on behalf of the state.

The rule universally applied in determining the effect of conveyances is, that if the thing granted was not in the grantor at the time of the grant, no estate passes to the grantee. A patent is but evidence of the grant, and the officer who issues it acts ministerially, and not judicially, if he had no authority to grant it, or another party had a higher equity, and should have received the patent courts in a proper action will pronounce it void. A court might hesitate to declare the title to land already received and in the possession of the defendant void, for the reason that their grantors had no authority to purchase such land, and were forbidden to do so by their charter, but if the title conveyed to their grantor was absolutely void, for want of authority to grant it, or their grantor to receive it, the title would be held void even in a court of law.

In reference to the patenting of these lands to the Northern Pacific Railway Company, the question is not that of "ultra viras," but of the power and authority of the government to convey, and the railroad company to receive.

There must be in all grants first a grantor with power to convey, and second a grantee with authority to receive. I contend that there was wanting in this case

both a grantor and a grantee. Where the officer has no authority in law to grant, such grant is void, for a public officer can bind the government only within the scope of his lawful authority (U. S. v. Stone, 69 U. S. 765). If the officer has authority to grant, but the grantee has no authority to receive, the grant is void for the same reason. It is not a question of "ultra vires" for that can only occur where the grantee has exceeded its powers, but here is an entire want of power to receive the grant. In such cases the grant is held absolutely void, not voidable.

The existence of a grantee authorized to take the grant is absolutely essential to every grant, and the grant to a fictitious person or corporation is a mere nullity, and can in no manner affect the title of the lands purporting to be granted.

Thomas vs. Wyatt, 31 Mo. 188;
Doughett vs. Stinson, 63 Mo. 268;
U. S. vs. S. C. C. & T. Co., 18 Fed, Rep. 273-276;
Russel vs. Topping, 5 McLean, 194-202;
Harriman vs. Loutham, 10 Ind., 190;
Devlin on Deeds, Sec. 191.

It is settled that where it is doubtful whether a corporation has exceeded its powers or abused its corporate franchise in the acquisition of title to land, strangers cannot litigate the question, at least after the title has vested. The question then is one between the state and the corporation.

But while this is true, it is equally well settled that where the acquisition is prohibited, a grant to such corporation would be absolutely void and would not pass the title.

Russel vs. Topping, 5 McLean, 194;
Harriman vs. Southam, 16 Ind. 190;
Chataugua County Bank vs. Risley, 14 Denio, 480;
Michigan Bank vs. Niles, 1 Doug. 401;
People vs. Bank of Oakland Co., 4 Denio, 280.

The question presented is not one of doubt as to whether or not it has exceeded its powers or abused its corporate franchise.

It is not therefore to be governed by those decisions where the question of the right of the corporation to take lands is a question of doubt which the corporation has a right to have passed upon by the courts.

Further in the case at bar, the question is not that of divesting from a corporation a vested title, but whether or not any title ever vested in the corporation.

In conclusion we aske the careful consideration of the court to the following propositions:

1st.—That the Northern Pacific Railroad Company, under the proviso in Sec. 3 of the act of July 2, 1864, was not entitled to any lands that were included within the act of May 5, 1864, such act being prior in date to the Northern Pacific Railroad Company, and should be deducted from the amount of lands granted to said Northern Pacific Railroad Company, and charged to the same.

2d.—If such should be determined by the court not to be the law, we then insist that after the definite location of the Lake Superior & Mississippi Railroad, who was the beneficiary of the grant of May 5, 1864, the lands with the

place and indemnity limits of the Lake Superior & Mississippi Railroad, would by relation, be considered from the date of the grant May 5, 1864, this would be prior to the date of the Northern Pacific Railroad Company's grant, and if the land claimed to have been lost by reason of its being patented for the benefit of the Lake Superior & Mississippi Railroad Company, the lien land should have been selected within the first indemnity limits, a selection of land within the second indemnity limits could not be sustained.

3d.—The cancellation of the list of selections made by the Northern Pacific Railroad Company, filed October 17, 1883, in the local office and the land covered by the same being restored to the public domain, and while the land was thus situate Richard B. Jones made application to purchase the land in controversy, and his application accepted, the proof as required by law made, the price for the land paid, and the usual receipt for the same was given, after all this had been done Jones would have a vested right in the land which could not be divested by the land department without a hearing.

4th.—That Richard B. Jones, on December 17, 1897, filed his application to purchase the land in controversy, his application having been accepted by the local officers, proof made as the law requires, the money paid for the land and the usual receipt issued, he came within the provisions of the act of Congress dated July 1, 1898, and the claim, if he so desired, should have been adjusted under that act.

5th.—That the land selected in lieu of the land claimed to have been lost to the Northern Pacific Railroad grant, within the second indemnity of its grant, was vacant public land, and was such December 17, 1897, when Richard B.

Jones applied to purchase, and after said purchase, there was no interest equitable or legal vested either in the Northern Pacific Railroad Company or the Northern Pacific Railway Company which could be sold under the decree of the court.

6th.—The land within the place limits of the Northern Pacific Railroad Company, claimed to have been lost to its grant, which was the basis of the selection of the land in controversy was on the south side of the railroad line, while the land selected was on the north side of its line of road, such selection is void.

7th.—The decree under which this land was sold, dated May 25, 1899, particularly directed the manner in which the lands should be sold, to-wit (Record page 150):

> "All of the said lands for which letters patent have been issued to said defendant Northern Pacific Railroad Company, and the right to receive lands for which letters patent have not issued, but which have been selected by and certified to said company, shall be sold in single sections, or subdivisions thereof."

The land in controversy was not in either of these classe. It was neither patented to the Northern Pacific Railroad Company, nor selected by that company, and approved by the secretary, for the records show (Record p. 138), that the approval of the selection of this land was not until October 12, 1905. There was no authority given by this decree, to the special master to sell this land in the manner he did, and therefore no title to the same passed to the Northern Pacific Railway Company by reason of such sale.

8th.—The land in controversy was not included in the bill filed October 18, 1893, to foreclose the mortgage given by the Northern Pacific Railroad Company to the Farmers' Loan & Trust Company, nor in any of the subsequent mortgages given by that company. The bill filed August 15, 1896, was dismissed November 15th, 1893, so far as it had any effect in the State of Minnesota, and which is the basis of these proceedings, gave the court no authority to make a decree for the sale of these lands for the court was without any jurisdiction.

9th.—That the selection of this land as indemnity for the loss of the land within the place limits of the grant to the Northern Pacific Railroad was void, for the reason that the lieu lands was not the nearest unappropriated land to the land lost. This fact should have been shown by the Northern Pacific Railroad Company.

10th.—The act of July 2, 1864, incorporating the Northern Pacific Railroad Company, did not intend to confer this grant on any other corporation hereafter to be organized, there is no evidence in the case that the Northern Pacific Railway Company is the successor to the Northern Pacific Railroad Company, or of any other company. The land department was without any authority to convey this land to the Northern Pacific Railway Company, neither had the Northern Pacific Railway Company, under its charter, any authority to receive such conveyance.

11th.—The act of July 2, 1864, conferred no authority upon the Northern Pacific Railroad Company to execute a mortgage upon the lands granted, but on the contrary expressly prohibited the making of a mortgage. The joint resolution of May 31,1870, gave consent that a mortgage might be given but that was a charter power and when

once exercised it was exhausted, the subsequent mortgages given after the mortgage dated July 1, 1870, are all without authority and are illegal and void.

Dated January 3, 1910.

H. H. HOYT,
Counsel and Solicitor for Appellee.

INDEX.

Page

The Charter of the Northern Pacific Railroad Co..... 2
Section 3 of said Charter..... 3
Section 20 of said Charter..... 5
Section 8 of said Charter..... 6
The Jay Cooke Mortgage, dated July 1, 1870..... 9
The Northern Pacific Railroad Co. after its first organization.....14
The Complaint of Aug. 15, 1893.....18
Foreclosure Case, filed Oct. 18, 1892.....18
The Order of the Court in the Case of Winston vs. Northern Pacific Pacific Railroad Co., Order Dismissing Bill.....21
The Decree made and entered May 25, 1896, based upon the Bill of Complaint filed Aug. 15, 1893.....24
Order Dismissing Receiver 25
April 27, 1899 Court directed the sale of lands lying within State of Minnesota and the State of North Dakota east of the Missouri River 26
Order Confirming this sale, dated Sept. 16, 1899.....26
The acceptance of the provisions of the grant of July 2, 1864 by the Northern Pacific Railroad Co. could not be changed or modified without consent of both parties.....29
Sec. 10—Charter of July 2, 1864.....30
First agreement presented for reorganization.....31
The distinction between the Bondholders of the Northern Pacific Co. 34
The Land Department 37
Statement of the Case.....39
Act of June 3, 1898.....41
Act of May 5, 1864.....42
Act of July 2, 1864.....48
The Width of the Grant to Northern Pacific Railroad Co.....48
Act of July 1, 1898.....62
Order of the Secretary of the Interior dated Aug. 27, 1896, fixing the Eastern terminus of the Northern Pacific Railroad Co. at Duluth and restoring to the Public Domain all lands lying east of that place 73
Construction that should be given to the Act July 1, 1898.....75
Secretary of the Interior fixing the Eastern terminus of the Northern Pacific Railroad Co.....77
Sjoli vs. Dreschel, 199 U. S. (L. ed.) 564.....81
Under the Act of July 2, 1864, Sec. 3, of said Act, the Northern

Pacific Railroad Co. was limited to 10 alternate sections of land on each side of road 83
The United States vs. Burlington & Missouri River Railroad.....90
Southern Pacific Railroad Co. vs. Smith.....91
No right to selection, Oct. 17, 1883, to select indemnity lands in the fan shaped diagram 94
The Northern Pacific Railway Co. is not the successor of the Northern Pacific Railroad Co. 95
April 21, 1896, committee on the Judiciary reported the Joint Resolution, previously offered to facilitate the reorganization of the Northern Pacific Railroad Co.....97
Jan. 23, 1897, the Joint Resolution came before the Senate for action, objection being made to its consideration the Joint Resolution was not acted upon and nothing further was done by Congress 98
July 1, 1896, the Corporate name of the Superior & St. Paul Railroad Co. was changed to the Northern Pacific Railway Co.....98
Nothing herein contained shall be construed as intended or having the effect to recognize the Northern Pacific Railway Co. as the lawful successor of the Northern Pacific Railroad Co. in the ownership of the lands granted by the United States to the Northern Pacific Railroad Co.....100
The report in the Northern Pacific Railway Co. to the railroad Commissioner of Wisconsin 101
Memphis, etc., Railroad Co. vs. Berry, 112 U. S. (L. ed.) 840.....102
Referring again to Sec. 10 of Act, June 2, 1864, we find this provision that no Mortgage or Construction Bonds shall be made in any way 103
In the case of the East Tennessee Railroad Co. vs. Frazier, 139 L. ed. 196.....106
The Title to this land at date of the sale by the Special Master under the order of the Court was in the United States.....106
The Complainant claim under this Special Sale of the Master that the sale was void 110
The Northern Pacific Railway Co. was not authorized by Charter to purchase or convey these lands.....117
The Incorporation of the Superior & St. Croix R. R. Co. with its amendments are void 118
The Statute of State of Minnesota indicates the policy of the State which forbids any Railroad Co. from owning over 5000 acres of land 125

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Clerk.

Supreme Court of the United States

OCTOBER TERM, 1909.

No. 24.

FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD, Appellants,

vs.

HERBERT H. HOYT, Appellee.

Brief of M. H. Stanford in Behalf of Herbert H. Hoyt, Appellee.

M. H. STANFORD,
Of Counsel for Appellee.

1910
MERRITT & HECTOR, PRINTERS,
DULUTH.

Supreme Court of the United States

OCTOBER TERM, 1909.

No. 195.

FREDERICK WEYERHAEUSER and JOHN A. HUMBIRD, Appellants,

vs.

HERBERT H. HOYT, Appellee.

BRIEF OF M. H. STANFORD IN BEHALF OF HERBERT H. HOYT, APPELLEE.

This action involves the title to 40 acres of land, known and described as follows:

The Southwest quarter of the Southeast quarter (SW¼ of SE¼) of Section seven (7), Township fifty-four (54) North of Range fourteen (14) West, in the Duluth Land District of the State of Minnesota.

This controversy, like that of No. 176, Campbell vs. Humbird and Weyerhaeuser, had its origin in the conflicting orders or rulings in the land department of the United States as to what was the eastern terminus of the Northern Pacific Railroad.

On December 17, 1897, Richard B. Jones, being in all respects duly qualified, tendered his application to purchase the land above described under the provisions of the

Act of Congress dated June 3, 1878, and known as the timber and stone Act. Accompanying his application was the usual affidavit required in such case. Jones' application was accepted and received by the officers in charge of the local United States Land Office at Duluth, and such proceedings were afterwards had on said application that the necessary proofs were taken and completed March 22, 1898, and on December 10, 1898, Jones made payment for the land and received the usual evidence of title to the same from the receiver, (Pg. 139 Record, for receiver's receipt.)

The foregoing allegations of the bill are admitted in the answer.

On December 19, 1898, Richard B. Jones and wife sold and conveyed the land in controversy by warranty deed for a valuable consideration to Minnie Stewart (Exhibit P., Pg. 139 Record).

On the 22nd of March, 1902, the said Minnie Stewart, with her husband, sold and conveyed the land in controversy for a valuable consideration to the complainant Hoyt, (Exhibit R, Pg. 141 Record).

The claim of the Railway Company to the land in controversy is the same as in Campbell vs. Weyerhaeuser and Humbird, and is based on the selection of October 1, 1883, and the re-arranged list of April 11, 1893.

The selection was not approved by the Secretary of the Interior until October 17, 1905, (P. 135-138, Record), and the patent was issued the next day, October 18, 1905, (P. 75, Record, answer).

The land lost claimed as the basis for the selection was the Northwest quarter of the Northeast quarter (NW¼ of NE¼) of Section Eleven (11), Township forty-six (46), Range sixteen (16) West, Minnesota, and was situated on the South side of the Railway Company's line of railroad in the western part of the state, while the land in controversy is situated on the North side of the Company's line of railroad east of Duluth.

The deed from the Railway Company to the appellees, Weyerhaeuser and Humbird of the land in controversy bears date, January 19, 1900, (P. 201, Record), nearly five years before the Railway Company's selections were approved.

The same conflicting orders and rulings of the land department of the United States, out of which the controversy in the Campbell case arose exist and apply to the case at bar.

The United States Circuit Court of Appeals held the entire beneficial interest and the equitable right to the land vested in Jones upon his completion of his purchase, and the railroad company and its successors in interest held the title under the patent in trust for him and his grantees.

It will be noted that the only difference between the case at bar and No. 176, is that Campbell was not permitted to make his proofs, and that his application was rejected, while in the case at bar Jones' application was accepted, his proofs received, he paid for the land, and was given the usual receiver's receipt therefor long prior to the approval by the Secretary of the Interior of the Railroad Company's selection.

My brief filed in the Campbell case, No. 176, will therefore apply to the case at bar.

Mr. H. H. Hoyt has filed a full and comprehensive brief covering all of the questions involved in this case, and I will not tax the court in the consideration of another brief in this case.

Dated, March 22, 1910.

M. H. STANFORD,
Of Counsel for Appellee.